

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
vs.) 3:09-CR-00210-B(1)
)
JESSE WILLIAM MCGRAW,)
)
Defendant.)

SENTENCING HEARING
BEFORE THE HONORABLE JANE J. BOYLE
UNITED STATES DISTRICT JUDGE
MARCH 17, 2011

A P P E A R A N C E S

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transcript produced by computer.

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TRANSCRIPT OF PROCEEDINGS**CAROL ROGERS****Examination By Mr. Durden 27****Examination by Ms. Heath 36****ERIC MONTOYA McCLELLAN****Examination By Mr. Durden 39****Examination by Ms. Heath 44****ROBIN SHAW****Direct Examination By Ms. Heath 58****Cross-Examination by Mr. Durden 69****AJEET SINGH****Direct Examination By Ms. Heath 74****Cross-Examination by Mr. Durden 109**

1 (In open court at 2:55 p.m.)

2 THE COURT: The last case of the day, and
3 we're here for sentencing, is the U.S. v. McGraw
4 case. We will wait until Mr. McGraw gets out here.
5 For the record, it's 3:09-CR-210.

6 For the government?

7 MS. HEATH: Candy Heath for the
8 government.

9 THE COURT: And for the defense?

10 MR. DURDEN: Todd Durden for the
11 defendant.

12 THE COURT: And Mr. McGraw is here. If
13 you and your client will come up to the lectern,
14 please.

15 MR. DURDEN: Thank you, Your Honor.

16 THE COURT: Mr. McGraw, good afternoon.

17 THE DEFENDANT: Good afternoon.

18 THE COURT: As you know, we are here today
19 for the sentencing in your case. It's been pending
20 for a little bit longer than normal for a lot of
21 different reasons.

22 But I want to make sure, before we go too
23 far, that I've made sure that you and I have looked
24 over all the same paperwork, there's nothing else
25 that's out there that I should see, and that you

1 have had a chance to look with Mr. Durden at all the
2 important papers.

3 And because I will be going through
4 several things with you, I will ask you to raise
5 your right hand and put you under oath.

6 (The Defendant was sworn.)

7 THE COURT: All right. Mr. McGraw, let's
8 talk first about the presentence report, the first
9 one.

10 Have you had a chance to review this
11 carefully with Mr. Durden?

12 THE DEFENDANT: Yes, Your Honor, I have.

13 THE COURT: Okay. You fully understand
14 it? Any questions about it? I know we've got some
15 objections, but I'm just now asking you if you
16 understand it.

17 THE DEFENDANT: Yes, I do understand it.

18 THE COURT: Okay. There was an addendum
19 that was filed in January that had to do with -- let
20 me see. It's filed January the 21st, and it had to
21 do with a competency issue.

22 Have you had a chance to review that with
23 Mr. Durden?

24 THE DEFENDANT: Yes, Your Honor, I have.

25 THE COURT: Any questions about that?

1 THE DEFENDANT: No, ma'am.

2 THE COURT: Mr. Durden, you've got it
3 there, and you agree you have reviewed this with
4 him?

5 MR. DURDEN: That is correct, Your Honor.

6 THE COURT: Okay. On February 10th of
7 this year, Mr. McGraw, Mr. Durden filed objections
8 to the presentence report on your behalf.

9 Have you had a chance to review those with
10 him?

11 THE DEFENDANT: Yes, I have, Your Honor.

12 THE COURT: Any question about those?

13 THE DEFENDANT: No. No, Your Honor.

14 THE COURT: The government, I believe,
15 about the same day or right after, filed a lengthy
16 document called Government's Comments, Corrections
17 and Objections to the Presentence Report and Motion
18 for Upward Departure.

19 Have you had a chance to review that
20 carefully?

21 THE DEFENDANT: Yes, Your Honor.

22 THE COURT: Any questions about that?

23 THE DEFENDANT: No, none.

24 THE COURT: Your attorney then filed a
25 response to the government's comments on

1 February 14th.

2 Have you had a chance to review that with
3 him?

4 THE DEFENDANT: Yes, I have, Your Honor.

5 THE COURT: Okay. And then there was a
6 second addendum filed by Probation in response to
7 all of the objections and comments by your counsel
8 and the government.

9 Have you had a chance to review that with
10 Mr. Durden?

11 THE DEFENDANT: Yes, I have, Your Honor.

12 THE COURT: Any questions about that?

13 THE DEFENDANT: No questions, Your Honor.

14 THE COURT: Right after that, your counsel
15 filed a response to the second addendum to the
16 presentence report.

17 Have you had a chance to review that with
18 him?

19 THE DEFENDANT: Yes, I have, Your Honor.

20 THE COURT: Any questions about that?

21 THE DEFENDANT: No, ma'am.

22 THE COURT: And then a sentencing
23 memorandum was filed for you by Mr. Durden on March
24 the 3rd.

25 Have you had a chance to review that with

1 him?

2 THE DEFENDANT: Yes, I have, Your Honor.

3 THE COURT: And then there was a Motion
4 for Sentencing Variance filed on March the 3rd of
5 this year.

6 Have you had a chance to review that with
7 him, that motion filed by your counsel?

8 THE DEFENDANT: Yes, I have, Your Honor.

9 THE COURT: And then the government filed
10 on March the 3rd their objections to the presentence
11 report, second addendum, and reurging their Motion
12 for Upward Departure.

13 Have you had a chance to review that?

14 THE DEFENDANT: Yes, I have, Your Honor.

15 THE COURT: Any questions about that?

16 THE DEFENDANT: No, ma'am.

17 THE COURT: And along the way, I believe
18 it was perhaps in the sentencing memo, I had
19 attached several letters from friends and family
20 members, which I have reviewed. I just wanted to
21 make sure you know I have looked at those and am
22 familiar with those letters.

23 So anything else that you are familiar
24 with that I should have for this sentencing?

25 Mr. Durden?

1 MR. DURDEN: No, Your Honor.

2 THE COURT: Government?

3 MS. HEATH: No, Your Honor.

4 THE COURT: Okay. Let's go ahead and
5 start going through these objections then,
6 Mr. Durden. Perhaps some have been resolved by
7 probation, perhaps some have not. But I want to
8 find out where we are with regard to your comments,
9 objections in particular.

10 MR. DURDEN: Okay. And Your Honor, I'm
11 looking at the document that was filed on
12 February 22nd by the probation officer. That would
13 be her second addendum to the presentence report.

14 THE COURT: Okay.

15 MR. DURDEN: I think that's probably the
16 key evidence in the hearing under Rule 32.

17 THE COURT REPORTER: I'm sorry, I can't
18 hear you.

19 THE COURT: We need you to speak up a
20 little bit. Could you say that again, perhaps?

21 MR. DURDEN: The key evidence in the
22 hearing under Rule 32 is, of course, the presentence
23 investigation report and then the probation
24 officer's report. So I will begin looking at the
25 objections that we have made that are addressed in

1 that report that I have in front of me.

2 The defendant's objections begin at
3 page 7 -- I should say the probation officer's
4 treatment of the defendant's objections begin on
5 page 7.

6 We have made an objection, as shown there
7 on paragraph Roman Numeral I, as to the
8 sophisticated means. We made the objection in
9 writing. And we haven't abandoned that objection,
10 but I have nothing further to offer on that.

11 THE COURT: You have not abandoned that
12 objection?

13 MR. DURDEN: Excuse me?

14 THE COURT: You said you have not
15 abandoned that objection?

16 MR. DURDEN: I haven't abandoned it. I
17 have nothing to offer further. I just ask the Court
18 to consider what you have before you.

19 THE COURT: Ms. Heath, of course I've read
20 your response. Is there anything you wanted to say
21 in addition to what you've already said?

22 MS. HEATH: Yes. Some of the evidence
23 that we intend to present would show that the
24 actions of the defendant while in the Carrell Clinic
25 Building with regard to the computers there did

1 constitute sophisticated means and that the
2 defendant's actions with regard to further
3 defacements and intrusions of other persons'
4 computers, other entities' computers, also
5 constitute sophisticated means.

6 THE COURT: I will let you do that. I
7 don't know that I need anything right now.

8 Mr. Durden?

9 MR. DURDEN: Okay. Thank you, Your Honor.
10 Then on paragraph --

11 THE COURT: I want to go ahead and resolve
12 each of these as we go. So is there anything else
13 on sophisticated means?

14 MR. DURDEN: No, Your Honor. We have made
15 the objection. We think that really the probation
16 officer's report sets forth adequate evidence.

17 And we would object to any further
18 evidence because we feel like, you know, we have
19 made our objection. The probation officer has
20 responded to it. It sets forth the facts that the
21 Court is supposed to consider under Rule 32, and we
22 believe you can rule upon it.

23 THE COURT: Well, the government is
24 certainly entitled to prepare to offer evidence
25 based upon your objection. The Court has the

1 discretion to decide whether or not we need to hear
2 it. But they are not precluded from offering
3 evidence just because there's an objection and you
4 haven't brought evidence yourself.

5 But having said that, we'll talk about
6 that in a moment.

7 The presentence report itself, in the
8 Court's view, more than adequately supports the
9 sophisticated means enhancement or adjustment, in
10 this Court's view.

11 If you're just looking at the paragraphs 7
12 through 20 alone, I think that justifies that the
13 crime itself was committed and would constitute by
14 sophisticated means.

15 So I overrule the objection just based on
16 the presentence report alone. Whether or not I need
17 to hear or it's in conjunction with other evidence
18 the government wants to offer later on in the
19 hearing, I will take up later.

20 What else did you have, Mr. Durden?

21 MR. DURDEN: Thank you, Your Honor.

22 Going back to Paragraph Number 2 and,
23 again this is on page 8 of the second addendum to
24 the presentence report, we had submitted to the
25 Court our objection as to the two-level enhancement.

1 Our point was that the guidelines require
2 either a conscious risk or a reckless risk of death
3 or serious bodily injury, and that wasn't present
4 here. So we made the objection, and we have no
5 further evidence to offer.

6 THE COURT: All right. Ms. Heath.

7 MS. HEATH: Your Honor, the risk that the
8 Probation Department has indicated, based on the
9 evidence presented to the Probation Department,
10 shows that the intrusions into the Carrell Clinic
11 computers, which contained medical records necessary
12 for any procedures that the doctors were engaging in
13 at the time and simply just the medical records that
14 could be altered and affect a patient's care while
15 at the facility, would put any patient at risk.

16 Additionally, the defendant accessed the
17 HVAC computer, which would affect the temperature
18 controls in the building. The temperature controls
19 in the building could adversely affect any of the
20 procedures, any of the equipment, any of the
21 supplies in the hospital and could put at risk a
22 person's safety. And there could a potential risk
23 of death, depending on the length of time and what
24 was actually occurring at the time.

25 THE COURT: Mr. Durden, in response,

1 anything else?

2 MR. DURDEN: Just briefly. The guidelines
3 require that the Court look to the intent of the
4 defendant. Did he consciously intend for death or a
5 substantial risk of death or serious bodily injury,
6 or was he reckless about it?

7 And the Court is familiar with many
8 offenses where people do take actions that are
9 just -- people can -- there's a serious risk of
10 death, there's a serious risk of people getting
11 hurt, drive-by shootings, things like this, where
12 there is a conscious effort on the part of the
13 defendant that people could be killed, people could
14 be hurt.

15 And when you have arguments like it could
16 have affected the treatment, I take the position it
17 does not reach to the level where you have shows
18 intent that people be hurt by the offense.

19 THE COURT: Okay. The reason I'm flipping
20 through this is I'm looking for a particular
21 paragraph in the presentence report that I think
22 speaks to this. So if you will bear with me just a
23 minute.

24 In paragraph 11 -- and there are many
25 other paragraphs that I think support this

1 enhancement. But in paragraph 11, when talking
2 about the HVAC screen and what he was able to get
3 from it or could get from it, my recollection, at
4 least here, and I'm looking at paragraph 11 on
5 page 4 of the presentence report -- is that the
6 defendant made the following statement to
7 characterize the HVAC computer: It's a slow, crappy
8 server computer, but it does have something neat on
9 it, something that could F blank some real S blank
10 up.

11 And I think that's indicative of what he
12 realized he was capable of doing by virtue of his
13 actions that he's been indicted for in this case.

14 So that and, I think, many other
15 paragraphs in the presentence report support that
16 enhancement that you've just objected to. So I
17 overrule your objection with regard to that second
18 area that is raised and spoken to in the second
19 addendum.

20 Mr. Durden, go ahead.

21 MR. DURDEN: Okay. After that, Your
22 Honor, as to III and actually IV, I would make the
23 same announcement. We have made our objections.

24 You know, we don't have anything further
25 to add, and we would ask the Court to make a ruling

1 on those.

2 THE COURT: Okay. And the first one has
3 to do with the obstruction of justice, and the
4 second one has to do with acceptance of
5 responsibility. Okay.

6 And before I go forward with this, I want
7 to make sure it's clear that in overruling the
8 objections, I'm relying on the presentence report as
9 well as the probation officer's reasons as she's set
10 them forth in the second addendum to the presentence
11 report. So I adopt those as well.

12 Ms. Heath, did you want to address either
13 of these?

14 MS. HEATH: Yes, Your Honor.

15 As far as the obstruction of justice,
16 first, there were search warrants issued while this
17 case was pending for a number of individuals that
18 Mr. McGraw had communicated with with regard to
19 obstructing justice.

20 The obstruction included things such as
21 instructing other individuals to obtain information
22 on an individual he believed to be an informant in
23 the case; to do things to interfere and harass that
24 particular person he believed to be an informant,
25 such as --

1 THE COURT: Described as CW in the
2 presentence report?

3 MS. HEATH: Correct, correct.

4 And some of the things he was directing
5 people to do would include a DDoS or
6 denial-of-service attack on that individual's
7 website, to get on the website and just talk badly
8 to the individual or make statements to the
9 individual.

10 He had an individual, Mr. Nichols, one of
11 the ETA members, another member of his hacking
12 organization, set up a website that would be
13 harassing the CW or the individual he believed to be
14 an informant in the case.

15 He had his sister look up information.
16 Which in the hacker world, you look up information
17 to have control over somebody. So you're trying to
18 find their home address, their home phone numbers,
19 their family members' names, what kind of cars they
20 drive, any sort of information that would give a
21 hacker power over an individual. He had his sister
22 looking up that information on the person he
23 believed to be an informant.

24 He also asked his sister to look up that
25 same type of information on me and on you, as the

1 judge in the case.

2 He also realized that the government was
3 aware of the other individuals in the ETA
4 organization and, at that time, tried to get word
5 out to those members that they were compromised and
6 that they needed to become what he called Defcon
7 Black, which was to basically go as far underground
8 as possible, destroy any records that they had.

9 He sent word out through his sister. He
10 made phone calls from jail to other ETA members to
11 try to get word out to those individuals. He talked
12 to one of the individuals directly and indicated
13 that they had been compromised and that they needed
14 to get rid of the ETA website, get rid of all the
15 evidence of anything that was going on and stop
16 doing anything overt that would get him in further
17 trouble and to protect themselves.

18 Based on some of the obstruction that he
19 was engaged in at that time, search warrants were
20 obtained and executed at his sister's house and at
21 three of the individuals that were members of the
22 Electronik Tribulation Army, the ETA.

23 The individuals agreed to provide
24 information to law enforcement as to their
25 communications with Mr. McGraw in addition to

1 computers at their houses that were seized, letters
2 between themselves and Mr. McGraw were seized.

3 In those letters were some of the
4 indications of this direct communication, the direct
5 instruction as to what they needed to do.

6 Additionally, the individuals, at least
7 one of the individuals, Mr. Nichols, advised law
8 enforcement that he had understood the warning that
9 he got from Mr. McGraw and had wiped his computer
10 clean and had sold the computer on craigslist or to
11 somebody else to get rid of that and had since tried
12 to destroy a lot of things that he had that would
13 connect him to Mr. McGraw to the ETA. So the
14 message got through, and evidence was destroyed.

15 Additional evidence was destroyed by his
16 sister. Mr. McGraw told his sister to go on to
17 Mr. McGraw's e-mail account and find e-mails that
18 related to a malware called The Beast and to delete
19 all of The Beast e-mails, to get rid of them.

20 And we know that she did do this because
21 prior to those instructions, we had done a search
22 warrant, obtained that e-mail account, and found
23 those Beast e-mails. And then after we realized
24 that she had that instruction, we again did a search
25 warrant to determine whether or not they had been

1 destroyed. And sure enough, they had been
2 destroyed.

3 So we do know that he had directed her to
4 destroy evidence in the case and that she did
5 destroy what she believed to be the evidence in the
6 case.

7 THE COURT: Thank you, Ms. Heath.

8 Mr. Durden, did you want respond to any of
9 that?

10 MR. DURDEN: Thank you, Your Honor. My
11 client has instructed me to withdraw the objection
12 to the obstruction of justice adjustment made by the
13 probation officer.

14 THE COURT: Mr. McGraw, you're standing
15 right here, so I can ask you. Do you agree with
16 that?

17 THE DEFENDANT: Yes, I do, Your Honor.

18 THE COURT: All right. I would overrule
19 the objection, if it was still standing, based upon
20 the information contained in the presentence report.
21 With it withdrawn, that's kind of a moot point.

22 But since we've gone through this exercise
23 in detail, Probation has done a very, very thorough
24 job in this case, Ms. Foster, and I think the
25 evidence in the presentence report supports the

1 enhancement. But having had it withdrawn, there is
2 no reason to make a ruling for the record.

3 So let's move on then to the next area,
4 Mr. Durden.

5 MR. DURDEN: Okay. May it please the
6 Court? Paragraphs IV, V, and VI on pages 9 and 10
7 of the second addendum to the presentence report,
8 they are submitted as objections.

9 But in looking at them more closely, I
10 believe they would be more properly considered by
11 the Court in weighing the factors under 3553. And
12 in stating this, I'm guided by Assistant Federal
13 Public Defender Doug Morris, who appeared before
14 this Court in the prior sentencing. And then
15 sometimes it does seem that there's some bit of
16 overlap.

17 For example, Paragraph V does talk about
18 the significantly reduced mental capacity, the
19 departure under 5K2.13.

20 And then, as the Court is well aware,
21 there are issues dealing with my client's -- his
22 childhood and some of his -- I will just use the
23 word issues, for no better term.

24 But I don't believe those would be best
25 addressed by the form of the objection, but rather

1 by the Court considering the factors under 3553 in
2 our motion thereunder.

3 THE COURT: Let me just back up for a
4 minute. Because you did object to IV, in
5 conjunction with your objection to the obstruction
6 of justice, and that was not withdrawn.

7 And just so the record is clear, I do
8 overrule that objection as to acceptance of
9 responsibility for the reasons set forth in the
10 presentence report.

11 And with regard to Objections V and VI,
12 I'm understanding you're withdrawing those. If you
13 were not withdrawing those, I would find that they
14 are supported by the presentence report. I mean the
15 presentence report's position that you've objected
16 to is supported by the presentence report. And I
17 would overrule those objections, but I'm
18 understanding you to have withdrawn them.

19 Am I correct?

20 MR. DURDEN: That's correct, Your Honor.
21 And Mr. McGraw is here to state that also.

22 THE DEFENDANT: That is correct, Your
23 Honor.

24 THE COURT: Okay, all right.

25 So where that leaves us with your

1 objections, Mr. Durden, and you have done a very
2 thorough job for your client here, and I want to
3 make sure he understands that, extremely thorough
4 with all the filings and the detail you have added
5 to the case, is there anything else?

6 MR. DURDEN: No, Your Honor.

7 THE COURT: I don't think there's anything
8 the government wants me to address right now with
9 regard to the presentence report, but I want to make
10 sure there's nothing I'm overlooking. I know you
11 have issues with regard to amount of loss and all of
12 that.

13 MS. HEATH: Yes, Your Honor. Other than
14 the victims and the amount of loss and the upward
15 departure.

16 THE COURT: All right. The Court then
17 overrules the objections to the extent stated,
18 except for those that are withdrawn, and adopts the
19 presentence report, as well as the first and second
20 addendum, as the findings, calculations and
21 conclusions of the Court, which I believe at least
22 initially leaves us where we started, which is an
23 offense level of 24, with a criminal history
24 category of 1 and a guideline range of 51 to 63
25 months.

1 So with that, Mr. Durden, I'm going to
2 turn to you and see what you have to offer, see what
3 you want to say, what your client wants to say. And
4 then I will give the government a chance to do so as
5 well.

6 MR. DURDEN: Thank you, Your Honor.

7 At this point in time I understand the
8 Court is dealing with the guidelines and the
9 determination. So I wish to inform the Court that
10 there are a number of people here that are present,
11 that wish the Court to know that they are here in
12 support of Mr. McGraw.

13 And with the Court's permission, I would
14 like to ask them to stand at this time. Would those
15 persons that are here on behalf of Jesse McGraw
16 please stand?

17 THE COURT: I know you all have been here
18 all afternoon, things that aren't even related to
19 anything you know about, so thank you very much. It
20 means very much to have the family come down here.
21 I know it's not an easy thing to do, so thank you
22 very much. Go ahead and take a seat.

23 MR. DURDEN: Just so the Court knows, I
24 don't intend to call of these people to testify. I
25 would give just a brief summary of who is here today

1 and why they are here.

2 THE COURT: Go ahead.

3 MR. DURDEN: We have the defendant's wife
4 and his mother-in-law and his sister-in-law, and
5 then we have his mother here also. We have his
6 pastor, and we have a number of people from the
7 church and the prison ministry of the church,
8 including a psychologist who works in the prison
9 ministry is here.

10 THE COURT: All right.

11 MR. DURDEN: And basically I would proffer
12 that if they were to testify, they would testify
13 that they have known Jesse. They have known him
14 actually participating before in the prison ministry
15 and in the ministries of the church.

16 About a year ago, he kind of fell out of
17 participation. His behavior changed. But they
18 would tell the Court that they are here to support
19 him; they are to support the Court; that at that
20 time that he is released, and whenever it is, they
21 know he will be released on supervision, that they
22 are here to support the Court to make sure that he
23 lives up to the terms of the supervision and help
24 him in any way they can to live on the right track.

25 THE COURT: Thank you, Mr. Durden.

1 MR. DURDEN: Thank you, Your Honor.

2 THE COURT: Go ahead.

3 MR. DURDEN: Other than that, Your Honor,
4 as far as testimony, I will be calling the
5 defendant's mother, Carol Rogers, to testify.

6 Briefly, because of the client's
7 background, it has to do with his childhood and some
8 things that -- it's a little bit different from the
9 average defendant.

10 I may ask his wife to make a very brief
11 statement; perhaps his pastor, also. I think they
12 could testify from the lectern, but I would ask his
13 mother to testify from the witness stand.

14 THE COURT: That's fine. Before I go any
15 further, I want to clarify something because we've
16 had more comments on the presentence report in this
17 case than normal.

18 To the extent I have adopted the
19 presentence report and all of its findings, I know
20 we still have some open issues with the government,
21 which would include -- and I want to make sure I
22 haven't made a determination as to those -- the
23 amount of loss; the victim issue, which you all
24 disagree about; not raised by you, raised by you,
25 and then objected to by you; and I think there was

1 another point.

2 MS. HEATH: His role in the offense, as
3 well as just the upper departure grounds.

4 THE COURT: Okay, all right.

5 With that understanding, let's go ahead,
6 Mr. Durden.

7 MR. DURDEN: Okay. Thank you, Your Honor.

8 Then I would ask my client to go ahead and
9 make his statement, and then I will make some
10 allocutions on his behalf.

11 Would the Court like to hear the evidence
12 as far as like the 3553 factors, the testimony of
13 the mother --

14 THE COURT: I think you should put on
15 whatever you have, including 3553, at this time in
16 whatever order you choose. You might want to give
17 Mr. McGraw a chance to hear everything before he
18 speaks, but I will leave that up to you.

19 MR. DURDEN: That will be fine. Then I
20 would like to call Carol Rogers, his mother, to
21 testify at the time.

22 THE COURT: She's going to come to the
23 lectern?

24 MR. DURDEN: Actually, I would like for
25 her to speak from the witness box.

1 THE COURT: That's fine.

2 Ms. Rogers, come up here. Watch for cords
3 and whatnot, and if you will raise your right hand.

4 **CAROL ROGERS,**
5 **having been first duly sworn, testified as follows:**

6 THE COURT: Ms. Rogers, have a seat,
7 please.

8 **EXAMINATION**

9 **BY MR. DURDEN:**

10 Q. Please state your full name for the Court.

11 A. Carol Rogers.

12 Q. And how are you related to the defendant in
13 this case?

14 A. I am his mother, biological.

15 Q. And I'm going to call him Jesse then, not the
16 defendant, while I'm examining you.

17 Can you tell me a little bit about Jesse, about
18 when he was born and his early childhood?

19 A. He was born in Fort Worth, Texas. And he was
20 with me for about two and a half years, and --

21 Q. Was that in Fort Worth, Texas?

22 A. Sir?

23 Q. Was that in Fort Worth, Texas?

24 A. Yes, sir. Yes, sir.

25 Q. When you say he was with you, does that mean

1 you had primary care and custody of him at that
2 time?

3 A. Yes.

4 Q. You took care of him?

5 A. Yes. Well, I didn't do a very good job. The
6 first couple of years of his life, I was strung out
7 on amphetamines. And it was a pretty rough ride,
8 and I wasn't a very good mother to him.

9 And actually, at the time he was -- my father
10 was helping me at the time, as well, because I was
11 so messed up. I mean I was beyond helping and
12 taking care of my own child.

13 Q. You were a drug addict?

14 A. Yes. Yes, sir.

15 Q. And what about Jesse's father?

16 A. He was a heroin addict.

17 Q. How did this affect Jesse at that time?

18 A. He was tossed around quite a bit. I know it
19 had to hurt him. I just -- I wasn't very good with
20 him.

21 Q. What happened?

22 A. I had to send him away with his biological
23 father. I felt like he could take better care of
24 him because I was constantly using every day.

25 And he had lived with his father, which was in

1 the Navy, and I thought that they would take better
2 care of him than me.

3 Q. Did he?

4 A. No. They actually abandoned him, and he was
5 fending for himself for years, and I had no
6 recollection of that.

7 And the old man turned to drinking again. I
8 knew he had a drinking problem. But I had asked
9 people how he was doing I think one time. And they
10 said he was doing fine, but they were lying. I did
11 get to talk to him about six months after I gave him
12 to his father --

13 Q. So you didn't see him at all for six months?

14 A. I didn't even -- I talked to him one time up
15 until the time I seen him whenever he was grown.

16 Q. So from the time he was two and a half years
17 old, he didn't see his mother until when?

18 A. No.

19 Q. When?

20 A. Not until he was 19 years old. But I did talk
21 to him about six months after. And I can remember
22 him crying for me and saying, I miss you, Mom.

23 And my heart was just so hard, and I was just,
24 you know, in that lifestyle where it just didn't
25 matter. He was out of my sight and out of my mind.

1 So I just -- you know, I have it engrafted in my
2 mind forever of his cries for me.

3 Q. Did you spend some time in prison?

4 A. Yes. After years of drug abuse and everything,
5 I went to prison in 1998. There I really believe I
6 received the help that I needed, because I had done
7 so many terrible things to my children. He wasn't
8 the only victim. I mean I abused all of them.

9 I didn't want to grow up to be an abuser, but
10 the very thing that I didn't want to do to my
11 children was the very thing that I did.

12 And I got saved there. And my life started
13 shifting around because I knew I had done so many
14 horrible things to my kids and -- I mean it took me
15 years to be able to feel what my children actually
16 had to go through.

17 And whenever I started feeling, you know, what
18 I did to my children, I was just like, only God
19 could forgive me because no one else could. I mean
20 I was just terrible. Everybody in my family
21 constantly was saying that I was just a horrible
22 mother, and I had to live with that.

23 But somewhere in the back of my mind, I knew
24 one day that I would see him when he would grow up.

25 Q. Did you start making efforts to reunite with

1 your son?

2 A. I just started praying about it and looking for
3 him over the Internet.

4 Q. And eventually did you find him again?

5 A. His adopted mother hired an adoption detective
6 or something to that matter and found me, and --

7 Q. Did you respond to that?

8 A. Yes, sir, I did. Yes, sir, I did.

9 Q. Tell me about you being united with Jesse and
10 what happened at that time.

11 A. Well, when I got reunited with him, I mean it
12 was a really exciting time. And I could just feel
13 something in my heart changed, because it was a part
14 of my life that I didn't think I could ever be
15 forgiven for. And it brought some healing to my
16 heart just to see him come to Texas and want to see
17 me.

18 And it was wonderful. Because within weeks, he
19 was playing music in our church. And I mean I would
20 look at him, and he would be crying because he
21 wanted what I had. And right away we made a
22 connection together.

23 Q. About what time was it that he came back here
24 to the DFW area?

25 A. It was in '04.

1 Q. Okay. 2004?

2 A. Yes.

3 Q. And you mentioned attending church with him.
4 Did he become involved in the church at that time?

5 A. Yes. Immediately they seen the giftings that
6 he had, and he wanted to use them. And instead of
7 using them where he was using them prior, I guess he
8 was just playing for different bands or whatever, he
9 wanted to use them for the Lord.

10 Q. And you say, "giftings." Is he gifted in
11 musical abilities?

12 A. Yes. He has many, many giftings. He plays
13 many, many instruments.

14 Q. And would you tell the Court what church this
15 is that he's involved in or has been involved in?

16 A. The Mercy Seat Church.

17 Q. And it's located --

18 A. In North Richland Hills, Texas.

19 Q. Okay. And so we know, when we talk about the
20 church, that we're talking about the Mercy Seat
21 Church. And the people here today are from the
22 Mercy Seat Church?

23 A. Yes, sir. Yes, sir.

24 Q. Now, does the Mercy Seat Church have a prison
25 ministry?

1 A. Yes.

2 Q. Was Jesse involved in that prison ministry?

3 A. Yes. He did several different ministries,
4 whatever Bishop wanted him to do. He was involved
5 in every -- he did nursing homes, street ministry,
6 everything, prison ministry.

7 Q. What was his role in these ministries?

8 A. He was a musician, minister, a minister of
9 music.

10 Q. Are you involved in the ministry yourself?

11 A. Yes, sir. I'm a chaplain for Tarrant County
12 Jail, and I have been since '05. And I've been a
13 prison minister since '02. I also am a pastor's
14 wife since 2000.

15 Q. Now, Jesse was involved with this in 2004. At
16 some point did he withdraw from participation in the
17 church?

18 A. Yes, he did, sir. And I think he was only gone
19 for about a year. I mean it wasn't something that
20 he was practicing the whole time that we were
21 together.

22 Q. Okay. So about 2008, then?

23 A. Yes, sir.

24 Q. Okay. Okay. About a year before his arrest --

25 A. Yes, sir.

1 Q. All right.

2 A. Yes. He was currently involved in many
3 different things that was good for the community.
4 Charities, things like that.

5 Q. Okay, all right. Now, is further work in the
6 prison ministry something that Jesse is looking
7 forward to?

8 A. Yes, I believe so. I believe that he has a
9 preaching ability. Since he's been locked up, I
10 have just seen him, you know, be -- I mean maybe at
11 first, he was still puffed up. But I've seen him go
12 down into humility and see that there's a call on
13 his life.

14 And we are worldwide ministers together. And I
15 believe that, you know, with all my heart. I've
16 seen him play, and I know he can play before
17 thousands, and he has that in him. He has it in
18 him.

19 I've seen his teachings, his writings. His
20 things make me cry. They didn't the first year.
21 But his life -- I mean he's building in character.

22 And I know when he was living with me, I
23 remember him being -- I mean he was very immature.
24 And I even asked his wife, I was like, My God, do
25 you want to float down the river with him in a trash

1 can?

2 I mean he was very, very creative. He liked to
3 make movies. He did lots of things for people in
4 our neighborhoods and all the young people, the
5 youth. I mean I seen him pray and fast and go
6 without food. I mean he's just a very creative
7 individual, very creative.

8 Q. He's been in custody since 2009; is that
9 correct?

10 A. Yes, sir.

11 Q. Have you been in communication and in contact
12 with him since that time?

13 A. Yes, sir, I have.

14 Q. You've mentioned that you've seen a change in
15 him over the months of his incarceration?

16 A. Yes, sir, I have.

17 Q. I believe he was incarcerated in June of 2009;
18 is that correct?

19 A. Yes, sir.

20 Q. Okay. Now, you've been there for him
21 throughout his incarceration?

22 A. Yes.

23 Q. And will you be there for him when he's
24 ultimately released by this Court?

25 A. Absolutely, yes.

1 MR. DURDEN: Thank you. Thank you. Pass
2 the witness.

3 THE COURT: Thank you, Mr. Durden.
4 Do you have any questions, Ms. Heath?

5 MS. HEATH: Yes, Your Honor.

6 **EXAMINATION**

7 BY MS. HEATH:

8 Q. You mentioned, Ms. Rogers, that it was the
9 Mercy Seat Church in North Richland Hills?

10 A. Yes, ma'am.

11 Q. And were you aware of the period of time when I
12 believe it was the Bishop there had instructed
13 Mr. McGraw not to use the computers there anymore
14 because they had found malware on their computers
15 that he had planted there?

16 A. No, I was not aware of that.

17 Q. And that the church --

18 A. I know. I know that -- you know, I didn't know
19 anything about any malware or anything like that,
20 no.

21 Q. And that the church had to hire somebody to fix
22 their own computers because of what Jesse McGraw had
23 done; you're not aware of that?

24 A. I don't think so, no. I don't recall.

25 Q. Mr. McGraw, your son, has not sent you copies

1 of letters that he has sent to other members of his
2 hacking organization, has he?

3 A. No. I would not -- no.

4 Q. Were you even aware that your son was the
5 leader or self-proclaimed leader of a hacking
6 organization called the Electronik Tribulation Army?

7 A. I thought he was really immature, and I just
8 didn't realize -- I knew that there was -- I know
9 that's illegal, but I did not know that he was the
10 head of it. I did not know.

11 Q. Did you realize that while he's been
12 incarcerated, that he's maintained contact by
13 telephone and by letters with several members of
14 this Electronik Tribulation Army?

15 A. No, ma'am.

16 Q. And that through his letters, he has indicated
17 that he intends to get out of jail and take over the
18 organization again?

19 A. No, ma'am.

20 Q. Are you aware in the letters that he has
21 indicated to people that he -- or has instructed
22 some of these individuals to continue to go out and
23 hack individuals or harass other individuals in the
24 community?

25 A. No, ma'am.

1 Q. Were you aware that in a letter, he actually
2 bragged that he was able to gain unauthorized access
3 to one of the computers in prison while he's been
4 there?

5 A. No, ma'am.

6 Q. So there are some things about your son's life
7 that he may not be telling you; is that correct?

8 A. I knew he had some problems. I mean he has
9 told me that. But I really believe that he's not
10 still currently doing that at this month, this time.

11 Q. And that's what he's been representing to you,
12 that he is not doing this anymore?

13 A. Yeah.

14 Q. And he's representing to you that he has
15 changed his life?

16 A. I believe so, yes.

17 MS. HEATH: Pass the witness.

18 THE COURT: Redirect?

19 MR. DURDEN: No further questions, Your
20 Honor.

21 THE COURT: Thank you very much. You may
22 step down.

23 THE WITNESS: Thank you.

24 THE COURT: Do you have a character
25 witness?

1 MR. DURDEN: May I have just a moment,
2 Your Honor?

3 THE COURT: Yes.

4 MR. DURDEN: Your Honor, in light of the
5 cross-examination, I would like to call Bishop
6 McClellan to the stand to clear up maybe some issues
7 that the Court may have.

8 THE COURT: That's fine.

9 MR. DURDEN: The defense calls Bishop
10 McClellan.

11 THE COURT: If you will come around here,
12 please, and raise your right hand.

13 ERIC MONTOYA McCLELLAN,
14 having been first duly sworn, testified as follows:

15 EXAMINATION

16 BY MR. DURDEN:

17 Q. Please state your name for the Court.

18 A. Eric Montoya McClellan.

19 Q. And Mr. McClellan, are you the pastor of the
20 Mercy Seat Church?

21 A. I am.

22 Q. How long have you been the pastor out there at
23 the Mercy Seat Church?

24 A. Almost seven years.

25 Q. And I use the term "pastor." And I believe you

1 actually have the title of Bishop at that church; is
2 that correct?

3 A. That is.

4 Q. So you are the leader of that church?

5 A. Um-hum, yes, sir.

6 Q. And now let me ask you, did the church have to
7 remove malware from its computers that was put on by
8 Mr. McGraw?

9 A. A couple of statements that were made in that
10 last cross-examination were not true. We had some
11 issues with our computer.

12 But as far as removing those, the only comments
13 that we made to Jesse was that he needed to refrain
14 from using computers at a particular time for the
15 sake of pulling him out of that environment, trying
16 to counsel with Jesse on numerous occasions and talk
17 with him.

18 Q. And that's important because you worked very
19 closely with Jesse, didn't you?

20 A. Yes.

21 Q. In fact, he saw you very much like a father
22 figure?

23 A. Yes.

24 Q. And you were there, and you saw he had a
25 problem with obsession?

1 A. Yes, sir.

2 Q. And that obsession being with those computers?

3 A. If I may address that particular mindset?

4 Q. Yes.

5 A. In dealing with Jesse, Jesse is very immature.
6 He's almost like a child. I'm not trying to give
7 validity to what he did wrong. There is
8 repercussions for that.

9 But at the same time, with the remarks that
10 have been made, in looking at the counseling that I
11 have done with him over the period of time.

12 Also in regards to computers, if you give a
13 child those type of things, even my own son, looking
14 at the wrong things on the Internet, playing with
15 the wrong things, doing those type of things with
16 the mindset of someone who doesn't have the maturity
17 development to be able to handle those particular
18 things are going to go down the wrong path and be
19 influenced by those paths.

20 There is also the potential of helping him and
21 to assist him to get out of that particular mindset
22 and pulling back from those things. He chose the
23 wrong path, and we tried to prevent those things.
24 And this is where it's come to, so . . .

25 Q. Now sometimes people make the wrong

1 decisions --

2 A. Yes.

3 Q. -- take the wrong path?

4 In fact, the ministry at the Mercy Seat Church
5 is to people that are in prison and who have gotten
6 out of prison; is that correct?

7 A. Yes, sir.

8 Q. Can you tell the Court a little bit about that
9 ministry?

10 A. We have a discipleship home. And it's actually
11 a retention so that we can keep from reciditation,
12 (sic) going back into the same prison systems again.
13 So recidi- -- how do you say it?

14 Q. Recidivism.

15 A. Yeah, thank you. So they don't go into the
16 prison systems again.

17 We have a discipleship home where we try to
18 carry those people through a process of getting them
19 to rehabilitate and to move their mind back into the
20 framework that can relate with society.

21 Q. And do you have a psychologist as part of that
22 ministry?

23 A. We have a clinical psychologist that does some
24 periodic counseling for us that is on staff there.

25 Q. Okay. And that's Mr. Galvan, is that correct?

1 He has Master's?

2 A. Ron Galvan, yes.

3 Q. Can you spell that full name for the court
4 reporter?

5 A. Ron, R-O-N, Galvan, G-A-L-V-I-N, I believe it
6 is.

7 MS. BRACHO: V-A-N.

8 Q. (By Mr. Durden) Is he present in court today?

9 A. He is.

10 Q. Mr. Galvan? There we go, okay.

11 And do you believe Jesse would benefit from
12 working -- let me ask you this: Has Jesse talked
13 with Mr. Galvan in the past?

14 A. He has.

15 Q. And do you believe he would benefit from
16 working in the prison ministry and working with
17 Mr. Galvan in the future?

18 A. Ask the question again. I apologize.

19 Q. I asked it actually in two parts.

20 Do you believe he would benefit from working
21 with Mr. Galvan in the future?

22 A. I believe that he could benefit. I always have
23 hope for individuals that they can be rehabilitated
24 and get into some corrective mindsets that would
25 benefit society.

1 Q. And did Jesse make a positive contribution to
2 the prison ministry when he participated in it?

3 A. He did the entire ministry, while he was there,
4 in functioning and flowing. He did contribute
5 tremendously.

6 Q. And is he welcome to come back?

7 A. He is always welcome to come back.

8 MR. DURDEN: Thank you very much.

9 I pass the witness, Your Honor.

10 THE COURT: Questions?

11 MS. HEATH: Just a couple of questions,
12 Your Honor.

13 **EXAMINATION**

14 BY MS. HEATH:

15 Q. Mr. Bishop, I'm Candy Heath.

16 A. Nice to meet you.

17 Q. I just wanted to make sure that I had the facts
18 correct.

19 A. Yes, ma'am.

20 Q. After Mr. McGraw was arrested, you had a
21 telephone conversation with an FBI agent; is that
22 correct?

23 A. I did. Yes, ma'am.

24 Q. And during that conversation, you indicated
25 that on one instance you had an occasion to find out

1 that Jesse McGraw had accessed the computers at the
2 church and placed malware on the computers.

3 A. No, ma'am, I didn't say that. What I did say
4 is that he had access to the computers. I didn't
5 know whether Jesse -- because if I had known it was
6 him, I would have made corrective actions then. So
7 I didn't know it was him.

8 And the thing is, is that the things that we
9 did, there was nobody that came in and did any
10 removal of any malware or those things there.

11 The only thing that I made the statement to the
12 FBI agent that is here is that I had him set aside
13 those computers for a time period because I knew
14 that it was beginning to have more of an influence
15 on him than he needed to have at that time.

16 Q. So you are indicating that there was no need to
17 have anybody remove anything from the computers?

18 A. No, ma'am.

19 Q. But you did instruct Jesse McGraw not to
20 continue using the computers at the church.

21 A. Yes, ma'am, that is true.

22 MS. HEATH: Okay. Pass the witness.
23 Nothing else.

24 THE COURT: Anything else, Mr. Durden?

25 MR. DURDEN: No further questions, Your

1 Honor.

2 THE COURT: You may step down.

3 Call your next I guess witness or --

4 MR. DURDEN: Just briefly, I would like to
5 call Beatriz Bracho, the defendant's wife, just to
6 make a brief statement to the Court at the lectern.

7 THE COURT: That's fine. If you will give
8 us -- right up there. You can do it at the
9 microphone.

10 MR. DURDEN: Beatriz, I'm sorry.

11 THE COURT: What I would like to do is
12 just get you to state your full name and spell your
13 last name.

14 MS. BRACHO: Beatriz Vanessa Bracho,
15 B-R-A-C-H-O.

16 (Ms. Bracho sworn.)

17 THE COURT: Go ahead.

18 MR. DURDEN: Just tell the Court who you
19 are.

20 MS. BRACHO: Well, we met in 2006. And I
21 mean, he's -- I am a very brittle diabetic, and he's
22 always been there to take care of me. He was also a
23 very good husband to me, and I don't see him as a
24 criminal at all.

25 He was just immature, just like what they

1 said. And everybody makes mistakes. And I mean I'm
2 still here for him and we are still together, and
3 he's -- my whole family also loves him very much.

4 THE COURT: Thank you.

5 MS. BRACHO: Uh-huh.

6 THE COURT: Mr. Durden, anyone else?

7 MR. DURDEN: No further witnesses, Your
8 Honor.

9 THE COURT: Mr. McGraw, of course, wants a
10 chance to say something. And I'm sure you do as
11 well.

12 MR. DURDEN: Yes, Your Honor.

13 Mr. McGraw, why don't you come up here?

14 THE DEFENDANT: Thank you, Your Honor.

15 This has been a very anticipated day for
16 me. I've been waiting for a long time. First off,
17 I mean here stands before you is a man who is
18 literally broken, ashamed and humiliated not by
19 anybody else, but by what I have done.

20 And not only that, but as being somebody
21 in a leadership role not only in my household, but
22 also within the ministry. For one thing, I'm
23 thankful that the youth in the ministry did not
24 follow me in this path.

25 In this path, there is no light at the end

1 of the tunnel. It's a very scary path and a violent
2 path. It's a path that has no future, no future
3 whatsoever.

4 The day that I got arrested, my life was
5 literally put on hold. And all I have is -- all I
6 had was the memories of the past. And I'm just so
7 thankful that my wife has been able to stand by me,
8 which is more than what I deserve.

9 I mean most people statistically in the
10 prison, their families will leave them within six
11 months. And we've been together for four years.
12 And I'm very, very thankful.

13 And honest to God, I am very guilty. I am
14 so guilty for what I have done. It just doesn't
15 stretch to the two counts of malicious code or the
16 two counts of the obstruction of justice. But it
17 ought to also stretch to the 13 or 14 counts in the
18 superseding indictment, as well as the 50-plus other
19 victims.

20 But moreover, the real victim in this is
21 my daughter and my wife. I've missed over 22
22 months' worth of development from my daughter,
23 Milania. I haven't been able to raise her. I
24 couldn't change any diapers. And just by the grace
25 of God, I believe she remembers who I am.

1 And my wife, being a type 1 or a type 2
2 diabetic, hypoglycemia myelitis, knowing that she is
3 laying in bed with -- having a diabetic seizure and
4 having to have the Emergency Response Team have to
5 revive her and I'm not there to take care of her,
6 this isn't just about -- this is -- this is
7 moreover -- I have made just a horrible, horrible
8 mistake.

9 And coming to prison really was a slap in
10 the face, and it is a reality check. Because I've
11 lived so long, lived so long pretending to be
12 somebody I'm not, when I know what my future is. I
13 know what my destiny is. I know exactly what my
14 purpose in life is.

15 And the fact that I wasn't pursuing that
16 really -- excuse me. And I can't live the rest of
17 my life wasting away for something that's so
18 trivial.

19 It's so stupid, juvenile posturing is, and
20 committing crimes that -- these people won't
21 remember who I am in five years from now. They're
22 not the one putting money on my commissary. They're
23 not coming up to visit me. It's been my mother, my
24 pastor, my wife bringing my daughter. I love them
25 very, very much.

1 And I just wanted to thank the United
2 States Government, moreover the Dallas FBI, because
3 if they hadn't intervened, I would still be out
4 there, wasting my life away, when I should be doing
5 music, I should be doing ministry. That's what I
6 love. That's what I do.

7 Before I ever got into computers, I did
8 music. I've been playing music since I was seven
9 years old. I can almost play just about anything
10 ever made. It's just been my knack, and it's been
11 my gift. It's my love, what I do.

12 And since I've been locked up, I've been
13 spending a lot of time, a lot of time reading and
14 studying. So when I do get a chance to get out, I
15 have new knowledge by evolving myself, evolving my
16 mind and putting off what is old, what is former. I
17 don't need computer hacking.

18 What I need is knowledge, and knowledge to
19 put forth in a productive manner, in a productive
20 way, in ministry. That way, I could actually help
21 somebody, help people. That's what my destiny is,
22 to help people, to lead youth, to break the chains
23 of bondage, bondage like computer hacking, for one.
24 That is a bondage. I was addicted to it.

25 And anyone who is addicted to something is

1 a slave to that thing, and I was a slave. And
2 Special Agent Allyn Lynd, he played an important
3 role in delivering me from that, answering the call,
4 arresting me, and bringing me to prison so I could
5 wake up and see what I'm supposed to be doing and
6 what I shouldn't be doing anymore.

7 And for repentance, I repent, I repent.
8 Repent means to be remorseful for what you have done
9 and to make a 180-degree turn, not going back to
10 what you used to do, but pressing forward. Because
11 once you're set free, there's no logical reason to
12 go back and to do what you were doing before.

13 I can't live like that. Because if I ever
14 screwed up again, I would lose the support of my
15 wife, my daughter. I would lose them all, and
16 they're all I've got. They're all I have.

17 Thank you, Your Honor.

18 THE COURT: Thank you, Mr. McGraw.

19 Mr. Durden?

20 MR. DURDEN: Thank you, Your Honor.

21 May it please the Court?

22 THE COURT: I'm going to give you a chance
23 at the end to also make some closing comments, so I
24 don't want you to think this is your last chance.

25 MR. DURDEN: Well, thank you, Your Honor.

1 I have some brief comments about the law,
2 and then I will have some comments about Mr. McGraw
3 as a person. And I'll save the comments for him as
4 person until the end.

5 Briefly on the points of law, I would like
6 to offer -- I know the Court will be considering
7 some PSR points that the government has made --

8 THE COURT: I think that microphone might
9 need to be pulled back to your level.

10 MR. DURDEN: Okay. Thank you, Your Honor.

11 I would like to begin with, this is an
12 economic crime. This is a 2B1.1 guideline crime.
13 This is an economic crime.

14 And probably the central point of a crime
15 like that is that when you've done something wrong,
16 you've taken from somebody, you've harmed somebody
17 economically, you pay them back. That's as old as
18 the Code of Hammurabi. The old eye for an eye and
19 tooth for a tooth is actually a measure of justice.
20 I mean it's when you take something from somebody,
21 you pay them back.

22 That's something that I would ask the
23 Court to be careful with in calculating the amount
24 of restitution. Because I ask and believe that the
25 Court will enter an order of restitution because

1 that's part of our liberty. And part of justice is
2 that the wrongs and the harms that have been done
3 have to be paid back.

4 Now, we're here today for the sentencing
5 on the two counts to which Mr. McGraw pled guilty.
6 And there's a number of factors for the Court to
7 consider.

8 But I would just like to say this. In
9 hearing him speak, Mr. McGraw had a tough childhood.
10 And really, I feel sad for him, but yet what he had.
11 And then he didn't have the benefit of a public
12 school education. He was homeschooled.

13 His socialization skills. I will say,
14 when I first met Mr. McGraw, he was a very difficult
15 person to get along with. You know, he said bad
16 things. You know, he was difficult to get along
17 with. He said bad things about me. He said bad
18 things -- he said some bad things.

19 (Audience laughing.)

20 THE COURT: I'll just guess the rest.

21 MR. DURDEN: But you know, he never said
22 anything bad about his mom. You know, it takes a
23 lot to forgive somebody. A mother who would walk
24 out on her own child, leave him, leave him to fend
25 for himself, it takes a lot to forgive that. Jesse

1 has that kind of forgiveness.

2 Thank you, Your Honor.

3 THE COURT: Thank you, Mr. Durden.

4 Ms. Heath, just so the record is clear,
5 why don't you give us some preparatory remarks about
6 what you're going to be offering the evidence on. I
7 know you've already said that. But we're at that
8 the juncture now, so go ahead.

9 MS. HEATH: Not in any particular order,
10 but the government has filed objections to the
11 presentence report and the second addendum,
12 basically objecting to the fact that Mr. McGraw's
13 role in the offense was not taken into
14 consideration. It's the government's contention
15 that he is a leader and organizer, and we would like
16 to present evidence on that.

17 Connected to that would be the loss
18 figure, the intended loss. The government has
19 objected to the fact that the intended loss did not
20 cover all that could reasonably be foreseen from the
21 defendant's conduct in this case. And therefore, we
22 have objected to the presentence report and the
23 addendum.

24 Additionally, again connected to the loss
25 and the role in the offense would be the number of

1 victims actually impacted by Mr. McGraw's conduct.

2 And then finally, all of that also comes
3 into play with regard to our motion for upward
4 departure in this case. And the upward departure
5 not only includes those factors, but also includes
6 Mr. McGraw's attitude, as could be seen from the
7 offense in this case, and from the evidence that the
8 government has in its possession, which would
9 include any phone conversations or recordings made
10 by Mr. McGraw or letters written by Mr. McGraw
11 showing what his intent was even during the period
12 of time that he's been incarcerated.

13 The government has a representative from
14 the hospital to present some information about the
15 reasonably foreseeable impact and loss figure that
16 could be assessed, based on Mr. McGraw's conduct,
17 and also has at least one, if not two, of the
18 special agents, Special Agent Singh and Special
19 Agent Lynd, that could testify regarding
20 Mr. McGraw's conduct that resulted in the loss that
21 we are presenting and the number of victims we're
22 presenting and in the role in the offense.

23 THE COURT: All right.

24 MS. HEATH: First, we would like to call
25 Robin Shaw.

1 THE COURT: Agent Shaw.

2 MS. HEATH: No, just Robin Shaw.

3 THE COURT: Ms. Shaw?

4 MR. DURDEN: And Your Honor, if I may, the
5 defense's case was presented along the lines of the
6 second addendum to the presentence report.

7 And I do understand, as the Court has
8 pointed out, that under Rule 32, subpart (i)(2),
9 that the government has a right -- again, the PSR
10 report and the addendum are the primary evidence,
11 and the government does have a right to introduce
12 evidence on the objections.

13 I'm just going to ask which objection. Is
14 this I or II?

15 THE COURT: If you can clarify. Again, I
16 think they're entitled to -- there's a lot of
17 complexity, a lot of detail in this case. It's
18 unusual. It's more technologically advanced than
19 most of the cases we deal with.

20 I have no problem with the government
21 trying to clarify some things, and I think they have
22 clearly raised it with their two lengthy briefs.
23 But if you can do that for him, that would might be
24 helpful.

25 I'm pretty sure she has this set forth in

1 her objections, Document 84.

2 MS. HEATH: Ms. Shaw's testimony will go
3 to --

4 MR. DURDEN: I think paragraph number 1,
5 the probation officer --

6 THE COURT: I'll tell you what,
7 Mr. Durden. Let's do this. I'm very comfortable
8 that everything they're intending to offer is along
9 the lines of what they've objected to or somehow in
10 response to something that you've raised.

11 We can clarify this before we finish, but
12 I don't want to spend a lot of time right now trying
13 to do that. I think we're talking about the
14 intended loss. It's absolutely no secret that's a
15 been a big contention of the government since the
16 very first presentence report came out.

17 So we'll take a short break at some point
18 so perhaps we can clarify that. But I don't think
19 it in any way precludes them from offering evidence
20 on these issues that were clearly raised by the
21 objections in the presentence report long before
22 today.

23 All right. Come on up, Ms. Shaw.

24 MS. HEATH: I did find it. It's on page 4
25 of the second addendum, and it's paragraph III.

1 MR. DURDEN: Okay. Thank you.

2 THE COURT: Raise your right hand.

3 ROBIN SHAW,

4 **having been first duly sworn, testified as follows:**

5 **DIRECT EXAMINATION**

6 **BY MS. HEATH:**

7 Q. Please state your name and how you are
8 employed.

9 A. My name is Robin Shaw. I am the regional vice
10 president of a company called United Surgical
11 Partners. And we manage North Central Surgical
12 Center, which is the hospital.

13 Q. And within the building on Central Expressway,
14 what entities are there?

15 A. There is the Carrell Clinic; there are several
16 physician offices; there's a pharmacy, and then
17 there is our surgical hospital.

18 Q. Where in the building is the surgical hospital
19 located?

20 A. It occupies the first floor of Tower 1. Our
21 emergency room is in Tower 2, on the first floor.
22 We also have a patient care unit, which is --

23 THE COURT: Slow down just a little bit.

24 A. We have a patient care unit, 25 beds for
25 overnight stay for patients, on the second floor of

1 Tower 2.

2 Q. Briefly, what is your background that leads you
3 to this position?

4 A. I'm a registered nurse, and I've worked in
5 outpatient surgery centers and was an administrator.
6 Now I'm the regional vice president of eight
7 facilities in the Dallas area, two hospitals and six
8 outpatient surgery centers.

9 Q. So I take it that you're traveling quite often
10 during the day around to the different locations?

11 A. Around just the Dallas area.

12 Q. Let me direct your attention back to June of
13 2009 and ask you if you became aware of an incident
14 where the computers had been hacked into at the
15 Carrell Clinic Building.

16 A. I was called by one of my personnel at the
17 hospital. I was at another facility that was about
18 five miles away. And they told me there was a
19 situation going on, so I drove up to North Central.

20 Q. What was your responsibility with regard to the
21 situation that you were told about?

22 A. I was told that there was a potential
23 compromise of our computer system, and we weren't
24 sure to the extent that our system had been
25 compromised.

1 We have actually two computer systems. One
2 manages all of the patient accounting information.
3 It has all of the billing information for patients.
4 And the other is the system that manages the air
5 conditioning system of our facility.

6 Q. And with regard to the -- were both computers
7 affected, both systems affected?

8 A. We weren't sure at that time. We had to do
9 research. We have computers that are located
10 throughout our facility. I couldn't even tell you
11 how many computers there are. But there are over, I
12 would say, 50 computers throughout the facility,
13 printers and fax machines.

14 So we had to go into each system and check and
15 verify to see if that system had been compromised.

16 Q. And if you could let the judge know
17 approximately what size of a team was involved in
18 trying to determine what damage had been done.

19 A. We had a team of, let's see, probably five
20 people that are direct employees. And then our home
21 office is in Addison, so we have a computer network
22 that's based there.

23 And the specialists were involved, as well. So
24 there were, I don't know, maybe three or four of
25 them checking all of the computers to make sure

1 there was no compromise.

2 Q. And a while ago, at the government's direction,
3 you helped prepare a summary of different costs or
4 dollar figures related to that intrusion back in
5 June of 2009; is that correct?

6 A. Correct.

7 Q. And I believe that's Attachment D to the
8 Government's Comments, Corrections, Objections to
9 the Presentence Report.

10 And with regard to the information on
11 Attachment D -- and you have that in front of you;
12 is that correct?

13 A. I do.

14 Q. -- you did identify the personnel costs
15 directly associated with the discovery of the
16 compromise. Is that what you're talking about now?

17 A. We did.

18 Q. And what time was put in to determine what the
19 compromise was, just in general?

20 A. Oh, it was -- I would think it was hours, maybe
21 two days' worth of work, of research, a day and a
22 half.

23 Q. And do you recall whether or not both systems
24 that you have described were compromised?

25 A. No. Only our HVAC system was compromised. I

1 don't believe our patient accounting system was
2 compromised.

3 Q. With regard to the HVAC, how is your location
4 set up, and where is the HVAC located?

5 A. The computer closet where the HVAC is located
6 is on the first floor, behind the lounge. There are
7 several doors of access. And then that door is
8 locked with a key, so it's very secure.

9 Q. And the HVAC is the heating and ventilation and
10 air conditioning system; is that correct?

11 A. Correct.

12 Q. And how does that particular system impact the
13 surgery center?

14 A. Well, there are two different types of supplies
15 that you have in a hospital or surgery center. One
16 are implants, bone; there are tendons; there are
17 different implants that you can implant in patients
18 during different surgical procedures.

19 Those have to be maintained either frozen, cool
20 or room temperature. If they're heated to above
21 room temperature or where they're not supposed to
22 be, outside the acceptable range, then they have to
23 be discarded.

24 There are supplies that have to be kept at room
25 temperature. If they are outside room temperature

1 and the humidity goes up, they have to be discarded.
2 They can't be resterilized and used.

3 There is also instrumentation that you have
4 that has to be kept at room temperature. And if
5 that goes outside that safe range, it has to be
6 resterilized. So there are some items you can
7 resterilize and use, and others that you have to
8 discard.

9 Q. Did you make a determination -- when you were
10 trying to ascertain what damage could have been done
11 had the heating and air conditioning system been
12 compromised to the point of affecting the
13 temperature, did you determine what supplies and
14 equipment was on hand at that time?

15 A. That's correct. And we do a quarterly
16 inventory, so we have an idea every three months
17 where we go back and true up our supplies. You
18 know, your pharmaceuticals are huge because a lot of
19 those pharmaceutical items are kept at room
20 temperature.

21 Q. In June of 2009, had you, just within the
22 month, done a calculation of what supplies you had
23 on hand?

24 A. I believe we did that at the end of May.

25 Q. And the information that you have on

1 Attachment D, which sets out the supplies, the
2 pharmaceuticals, the implants, with a cost next to
3 it, what does that indicate? Was that the supplies
4 that were on hand at the time?

5 A. With -- I'm sorry, which?

6 Q. In the Supplies and Pharmaceuticals At Risk
7 section --

8 A. Um-hum.

9 Q. -- where you have the supplies listed,
10 pharmaceuticals --

11 A. These were implants on our shelves at the time.

12 Q. And these are the implants that had the
13 temperature --

14 A. They are all temperature sensitive.

15 Q. And so you would have lost those particular --

16 A. These items would have had to have been
17 discarded. You can't sterilize them to make them
18 okay, once they're out of range.

19 Q. The total amount would have been \$135,095?

20 A. That's correct.

21 Q. The next column down talks about costs
22 associated to resterilize. Is that what you just
23 talked about, as far as there are certain
24 instruments that, if they had been affected by the
25 heat and humidity, they would have needed to be

1 resterilized?

2 A. Correct. You don't have to discard them, but
3 you need to reprocess them.

4 Q. And the costs that you have associated with
5 those particular instruments total \$5,945, is that
6 correct?

7 THE COURT REPORTER: I'm sorry, Ms. Heath.
8 Can you ask that question again, please?

9 Q. (By Ms. Heath) And the value that you
10 associated with the instruments that needed to be
11 resterilized, had the temperature gone beyond where
12 it needed to be, was \$5,945?

13 A. Yes, ma'am.

14 Q. Additionally, you were asked about what
15 procedures were occurring over the July 4th weekend,
16 which was the target date for -- and I will present
17 evidence on this a little later. But that was the
18 target date for what the defendants intended
19 compromise was going to affect?

20 A. Correct.

21 Q. And so you were asked to determine, with regard
22 to the patients that were on hand or that had
23 appointments set up, what loss the hospital -- or
24 what the hospital would have to do in order to
25 accommodate a potential compromise at that time?

1 A. That's correct. If we had patients that had
2 had surgery and they were in the hospital without
3 air conditioning over the 4th of July, we would have
4 had to make arrangements at another facility and
5 have them transported.

6 Q. And according to your calculations and the
7 potential revenue lost and costs associated to
8 transport patients, you had approximately 12
9 patients that were in-patients; is that correct?

10 A. On this calculation, those were 12 patients
11 that were scheduled to have surgery on that Monday
12 that would have had to be canceled, and that revenue
13 would have been lost.

14 Q. And had the procedures started and they were
15 actually in-patients there, there would have been a
16 cost to transport each of them; is that correct?

17 A. Yes.

18 Q. And then the line 25 above that I believe
19 indicates 43 patients had actual appointments on
20 that Monday; is that correct?

21 A. Correct.

22 Q. And having to have canceled those and not able
23 to reschedule them would have been \$431,000; is that
24 correct?

25 A. Correct.

1 Q. Now with regard -- let me go back down to the
2 personnel costs that we talked about earlier.

3 And you have listed yourself and some of the
4 other individuals that worked to determine what the
5 compromise affected, what systems were affected,
6 what efforts were made by the hospital or by the
7 surgery center to repair what compromise had
8 occurred?

9 A. I'm not sure what all our IT Department did.
10 But I know they spent a lot of time going in and
11 trying to determine where the compromise was and how
12 they could fix it.

13 Q. And then the final line, number 39 on the
14 personnel costs, shows Fort Knox Security Company.

15 Let me take a step back. Mr. McGraw was
16 employed by another security company that was
17 contracted with the surgery center or the hospital,
18 the building, to provide security; is that correct?

19 A. Correct. We felt we needed security for our
20 employees and our patients. And so we contract with
21 another security company to -- there was another
22 security company that was contracted by the building
23 to secure the parking lot, make sure it's safe and
24 the doors were secured.

25 And so when this situation happened and it was

1 our security guard who was doing the hacking or
2 whatever into the computer, then we were very
3 frightened for our patients and our employees.

4 So we went outside and got another security
5 because we felt we were defenseless then. And we
6 wanted to make sure we were, you know, provided that
7 security.

8 Q. And that was done?

9 And the cost indicated here was only for a
10 limited time from the realization that the computers
11 in the building had been comprised to just shortly
12 after the July 4th weekend, July 11, 2009; is that
13 correct?

14 A. Yes.

15 Q. And for that cost, it was \$8,244?

16 A. Yes, ma'am.

17 Q. Now, you mentioned the security person's
18 responsibility to watch not only what was happening
19 in the building, but to watch the parking garage and
20 the exterior of the building, too; is that correct?

21 A. Correct.

22 Q. And although there is not necessarily a value
23 associated with it, let me ask you about the second
24 page of Attachment D, where it talks about security
25 issues from November of 2008 to that July 4th

1 weekend.

2 Had there been crimes committed on the property
3 during that period of time?

4 A. Yes, ma'am. I don't have that attachment, but
5 I can just tell you from memory that there were.

6 We had a break-in into the pharmacy of the
7 building, not the hospital. And there had been
8 also, I think, break-ins into some of the offices in
9 the building in the past.

10 Q. And in some of the cars in the parking lot?

11 A. There were cars stolen from the parking lot and
12 break-ins.

13 Q. And you're not here today to testify about
14 Mr. McGraw personally or what his intent was or how
15 he actually did the compromise; is that correct?

16 A. No, ma'am.

17 MS. HEATH: Your Honor, pass the witness.

18 THE COURT: Before we get into the cross,
19 I need to take about a five-minute break. So we
20 will break for five minutes and we will start the
21 cross.

22 (Recess taken from 4:13 to 4:26.)

23 THE COURT: Mr. Durden.

24 **CROSS-EXAMINATION**

25 **BY MR DURDEN:**

1 Q. Ms. Shaw, my name is Todd Durden, and I am the
2 attorney for the defendant in this case, Jesse
3 McGraw, and I'm going to ask you some questions.

4 And if I ask any question in a way that you
5 don't understand it, please let me know and I will
6 be glad to rephrase it.

7 A. Okay.

8 Q. Now, the attorney for the government asked you
9 some questions about losses that could have
10 happened. And in fact, she referred to
11 Attachment D; is that correct?

12 A. As what?

13 Q. She referred to what was Attachment D. It was
14 a spreadsheet that you have there.

15 Okay, very good. Thank you. I think I have a
16 copy of that.

17 Now, I notice a lot of these are costs that you
18 say if something had happened, then another cost
19 would have been incurred; is that correct?

20 A. Yes.

21 Q. Things like at-risk supplies. If the system
22 had been compromised and gone down, those supplies
23 would have been lost; is that correct?

24 A. Yes.

25 Q. And potential lost revenue and lost costs if

1 the patients had been canceled, like \$431,000 and
2 \$290; is that correct?

3 A. Yes.

4 Q. But that didn't happen, did it?

5 A. No.

6 Q. Now I'm going to ask you some questions about
7 actual out-of-pocket amounts that were spent.

8 A. Okay.

9 Q. Now, it looks like the costs associated to
10 resterilize the instrumentation, were those actual
11 costs?

12 A. No. That's what it would have cost if we had
13 to resterilize the instrumentation.

14 Q. So the at-risk supplies are not actual costs or
15 the resterilizations are not actual costs that were
16 incurred, correct?

17 A. Correct.

18 Q. Then the potential lost revenue and lost costs
19 associated to transport patients were not actual
20 costs incurred, either?

21 A. That's correct, they were not.

22 Q. Now, were there some out-of-pocket costs
23 incurred after this event took place?

24 A. Yes.

25 Q. What are those actual out-of-pocket costs? Is

1 that the one here --

2 A. Personnel costs directly associated with the
3 discovery.

4 Q. These are actual out-of-pocket costs?

5 A. Yes.

6 Q. Okay. Now the Knox Security Company, we have
7 that down -- that was the new security company that
8 you got; is that correct?

9 A. That was the security company that the hospital
10 actually hired because of this event.

11 Q. Okay, okay. Was that in addition to the
12 regular security company, or is it --

13 A. Correct.

14 Q. Is it a new one?

15 A. It was new to this time. At the time this
16 happened, we had only the building security in
17 place.

18 Q. Okay.

19 A. So after this happened with building security,
20 we decided to get our own security until it was
21 resolved.

22 Q. Okay, okay. So I'm just going to do some math
23 here. As far as actual out-of-pocket costs, I see
24 the 2,000, the 8,244 and -- I'm going to try to do
25 some math quickly -- it looks like about 1,000 of

1 other personnel costs there. So that looks like
2 it's about 11,244 -- 11,250, more or less, of actual
3 out-of-pocket costs?

4 A. That's correct.

5 Q. If Mr. McGraw repays that, would you feel that
6 he's made restitution in this case?

7 A. I don't know, sir.

8 Q. Okay, okay. But that's the actual
9 out-of-pocket loss that your company had; is that
10 correct?

11 A. That is correct.

12 MR. DURDEN: I'll pass the witness, Your
13 Honor.

14 THE COURT: Redirect?

15 MS. HEATH: No, Your Honor.

16 THE COURT: Thank you. May this witness
17 be excused?

18 MS. HEATH: Yes, Your Honor.

19 MR. DURDEN: Yes, Your Honor.

20 THE COURT: Ms. Shaw, you may be excused.
21 Thank you very much.

22 Call your next witness, Ms. Heath.

23 MS. HEATH: Yes, Your Honor. The
24 government calls Agent Singh.

25 THE COURT: Agent, come on up here. Raise

1 your right hand.

2 **AJEET SINGH,**

3 having been first duly sworn, testified as follows:

4 **DIRECT EXAMINATION**

5 **BY MS. HEATH:**

6 Q. Please state your name for the record.

7 A. My name is Ajeet Singh, S-I-N-G-H.

8 Q. And how are you currently employed?

9 A. I'm currently a supervisory special agent in
10 the FBI Cyber Division in Washington, D.C.

11 Q. When did you go to Washington, approximately?

12 A. April 26, 2010.

13 Q. Back in June of 2009, what was your position?

14 A. I was a special agent on the Dallas Cyber
15 Squad.

16 Q. Were you one of the case agents working on the
17 case involving Jesse McGraw?

18 A. Yes, I was.

19 Q. Now, with regard to this case, describe an
20 overview of what you, as an FBI agent, case agent,
21 did to investigate this matter.

22 A. We received a lead from our office in -- gosh,
23 it was a resident agency near Mississippi State.
24 Agent Provine provided me with some e-mails and some
25 other documentation related to a possible hack at a

1 local area hospital. Hack, you know, a computer
2 intrusion.

3 Q. And ultimately you had search warrants that
4 were issued; is that correct?

5 A. Correct. We had issued search warrants once we
6 identified who we believed had committed the
7 intrusions. We had a search warrant on his
8 apartment and his two vehicles.

9 Q. And a criminal complaint to arrest him?

10 A. And a criminal complaint to arrest him,
11 exactly.

12 Q. That was done during his shift, security shift
13 at the hospital; is that correct?

14 A. Right. We determined the best place to locate
15 him was -- after we acquired the complaint the same
16 day, which we got at 9:00 at night, we just executed
17 the arrest warrant at 11:00, when he showed up on
18 the scene.

19 Q. Were you one of the arresting agents of
20 Mr. McGraw?

21 A. Yes, I was.

22 MR. DURDEN: Your Honor, I'm going to
23 object to that question and this line of questioning
24 as being overly broad.

25 We're here, Your Honor, for a hearing

1 under Rule 32 of the Federal Rules of Criminal
2 Procedure. We've had a presentence investigation
3 report and a supplement, and all of these things are
4 set forth there. We're here now for a hearing on
5 objections under 32(i)(2).

6 THE COURT: Mr. Durden, let me look into
7 this first before you spend as much time objecting
8 that she was going to do spend asking him the
9 questions.

10 I'm taking it this goes to one of these
11 areas you have pointed out, Ms. Heath. We're not
12 going back through the entire background of the
13 case?

14 MS. HEATH: No, Your Honor. I was getting
15 up to then he interviewed the defendant and some
16 statements that the defendant made towards his role
17 in the offense.

18 THE COURT: I thought that's where she was
19 going. I'm fine with the background. Overruled for
20 right now, but I think you make a good point. I
21 don't think that's where she is going. Go ahead.

22 MS. HEATH: Thank you, Your Honor.

23 Q. (By Ms. Heath) So you were one of the
24 arresting agents of Mr. McGraw?

25 A. That is correct.

1 Q. At his arrest, did he make statements?

2 A. Yes, he did. We arrived there. And one of the
3 first things he said to us, was this about Ghost
4 Exodus?

5 But at that time, we hadn't secured the scene.
6 We hadn't gotten another security guard from the
7 company out there. So I told him essentially we
8 would talk to him later about it.

9 And then I went out to make sure we got another
10 security guard for the hospital.

11 Q. Did you have an opportunity, later that evening
12 or early the next morning, to interview Mr. McGraw?

13 A. Yes, we did. We brought him back to our field
14 office, just outside of Stemmons Freeway at One
15 Justice Way. And myself and Agent Lynd, who is also
16 in the room, interviewed him.

17 Q. And at that time Mr. McGraw admitted to hacking
18 into the Carrell Clinic computers?

19 A. That's correct.

20 Q. Did he indicate to you or state why he did
21 that, what his intent was?

22 A. We asked him why he did it and why he posted
23 the videos, which we showed him.

24 And he said, as a leader, you have to show that
25 you can do things. So my understanding was that his

1 intent was to show other people what he was doing.

2 Q. Did he indicate at any point that his intent
3 was to do a distributed denial-of-service attack on
4 rival hacker groups?

5 A. Yes. We asked him what Devils Night was. He
6 refers to Devils Night as July 4th. And he was
7 going to conduct a denial-of-service attacks against
8 rival --

9 Q. I'm sorry. You said a what?

10 A. Denial-of-service attacks.

11 THE COURT: I have a question, Agent, and
12 I just missed this. And that is: When you're
13 talking about the questions about him posting, is
14 this the area where he had posted pictures of the
15 HVAC computer system?

16 THE WITNESS: We did show him the pictures
17 of those postings, but also of the YouTube videos
18 that he had posted online.

19 THE COURT: Which reflected what?

20 THE WITNESS: His intrusion into what we
21 refer to as the Pink Flamingo computer in the
22 Carrell Clinic.

23 THE COURT: Okay. I was just trying to
24 see if what you were talking about related back to
25 the offense conduct in this case. Okay, go ahead.

1 MS. HEATH: And actually, we have the
2 videos, if the Court would like to see any portion
3 of those videos.

4 THE COURT: All right.

5 Q. (By Ms. Heath) So Mr. McGraw was explaining to
6 you that he was going to engage in a distributed
7 denial-of-service attack on a rival hacker group; is
8 that correct?

9 A. Yes, using the computers at the hospital.

10 Q. And a distributed denial-of-service attack is
11 something we've been referring to as DDoS, D-D-O-S;
12 is that correct?

13 A. Right.

14 Q. What exactly is a DDoS attack?

15 A. Essentially, a DDoS attack is when you have
16 multiple computers attempting to communicate with a
17 single computer, in the hope that the multiple
18 communications would use up all the resources on the
19 victim computer so that it would not be accessible
20 to legitimate users.

21 Q. How is it that repeated or multiple computers
22 repeatedly contacting a single victim computer would
23 cause damage to the victim computer?

24 A. Well, one of the resources of the computer will
25 be used. So it would be slower and could

1 potentially be open for reprisals from the other
2 group. In this case, Anonymous was one of the
3 groups that Mr. McGraw was planning to attack.

4 I don't know if you've seen the news, but they
5 were responsible for retaliation after the Wikileaks
6 arrest of Bradley Manning where they attacked
7 PayPal, took the PayPal servers offline.

8 Q. So one of the rival hacking groups that
9 Mr. McGraw identified for you was Anonymous; is that
10 correct?

11 A. Yes.

12 Q. Did he identify any other rivals or enemies of
13 his organization?

14 A. Anonymous was the primary one. But he also
15 indicated several IRC, Internet Relay Chat,
16 channels, where other groups -- 4chan was one of
17 them.

18 Q. What is an IRC channel?

19 A. Essentially, an IRC channel is a chat room or
20 similar to an instant messenger, except multiple
21 people get on there and they can talk about whatever
22 their interests are or hobbies.

23 It's also a forum where hackers exchange tools,
24 where identity thieves sell identities, buy
25 identities.

1 Q. And can an IRC channel such as 4chan be a
2 victim for this type of DDoS attack by multiple
3 computers?

4 A. Yes. Any service that's running on the
5 Internet could be a victim to this.

6 Q. Did Mr. McGraw tell you anything about his
7 hacking organization?

8 A. Yes. He said that he had started it with
9 another individual. I believe it was Nyk0N.

10 Q. Is that N-I-K-O-N?

11 A. I believe it's N-Y-K zero N, I believe.

12 And that the individual who was known as
13 Immortal first posted the HVAC pictures and provided
14 them to a Mr. Wesley McGrew.

15 He talked about knowing who Immortal was and
16 that Immortal was potentially a cooperating witness
17 for the Department of Defense.

18 He also had in his possession notebooks, which
19 had identifiers of the individuals by true name,
20 what he believed was their true names, and also
21 their identifiers. He provided phone numbers to us.

22 Q. During that first interview of Mr. McGraw right
23 after his arrest, did he write down for you the
24 names of some of the individuals that were members
25 of his Electronik Tribulation Army, his hacking

1 group?

2 A. Yes, he did.

3 MS. HEATH: Your Honor, may I approach the
4 witness?

5 THE COURT: You may.

6 Q. (By Ms. Heath) Let me show you Government's
7 Exhibit 2 and ask you if this is the document
8 written by Mr. McGraw indicating the list of some of
9 his ETA members.

10 A. That is correct.

11 Q. And on the remaining pages here, does it also
12 just indicate some other passwords or other
13 information that Mr. McGraw had at his disposal that
14 he was providing to the FBI?

15 A. Yes. He provided us with his common passwords.
16 And also at that time he provided consent for us to
17 look at his e-mail accounts, as well.

18 Q. On page -- I believe it's page 3 of the
19 document, does it indicate additional phone numbers
20 for some of the people that are mentioned on the
21 front, the first page of Government's Exhibit 2?

22 A. Yes, it does.

23 MS. HEATH: Your Honor, at this time the
24 government would offer Government's Exhibit 2.

25 THE COURT: Let's make sure Mr. Durden has

1 had a chance to see it.

2 MR. DURDEN: For what purpose, Your Honor?
3 I would ask the government for what purpose they are
4 offering Exhibit Number 2.

5 THE COURT: I think it would be your place
6 to offer an objection.

7 MR. DURDEN: I object to this, Your Honor.
8 I object to this as irrelevant. I don't believe
9 it's related to any of the issues pertaining to the
10 objections, and I cannot see why they are offering
11 this document at this time.

12 THE COURT: Ms. Heath?

13 MS. HEATH: Your Honor, this is a list of
14 some of the members of the Electronik Tribulation
15 Army, which, from further testimony, will show that
16 they were also involved in defacing computers and
17 hacking into computers in preparation for this
18 Devils Day, this July 4th attack.

19 THE COURT: Again, it all has to relate,
20 though, to the offense conduct here. I've heard the
21 agent talk about the discussion that he was sending
22 these pictures around of the inside of this HVAC
23 computer that's directly involved in this case. So
24 that indicates to me that there is some involvement.

25 But otherwise, I'm wondering if we're not

1 going a little far afield with connecting all these
2 entities back to this case.

3 MS. HEATH: Your Honor, in the factual
4 resume, the defendant also admits to the fact that
5 the reason that he committed a 10-30 violation at
6 the Carrell Clinic was to commit further 10-30
7 violations, which would be DDoS attacks on rival
8 gang members or rival hacker groups; and that the
9 intrusions at the Carrell Clinic were a portion of
10 the bigger picture, which are the intrusions of all
11 these other computers that they had to get control
12 of so they then could do this DDoS attack on the
13 rival hacker groups.

14 The more computers you have, the more
15 power you have to take down the system somewhere.

16 THE COURT: All right. Mr. Durden?

17 MR. DURDEN: Thank you, Your Honor. May
18 it please the Court?

19 Mr. McGraw pled guilty to two counts of an
20 indictment. And there is a 14-count superseding
21 indictment out there that he is not on trial for and
22 we are not here to hear today. We are here to hear
23 evidence as to Rule 32(i)(2), which is related to
24 the objections that the government has made.

25 And my understanding was that this list of

1 persons was something to do with whether or not they
2 were -- that my client was somehow a leader because
3 he would have supervised them. That was my
4 understanding of why this list was being offered and
5 what his testimony was going into.

6 If that's the case, I would like to take
7 the witness on voir dire.

8 THE COURT: Okay, here's what I'm going to
9 do. Give me just a moment before I make a ruling.
10 I want look to look at something real quick.

11 The Rules of Evidence don't really apply
12 to a sentencing proceeding, other than to the extent
13 that they affect due process, right to
14 cross-examine, all of that.

15 This, as I understand it, is something
16 that the agent can identify as something that was
17 prepared by the defendant?

18 THE WITNESS: Yes, correct.

19 THE COURT: So I don't see a confrontation
20 issue there. I understand that it probably goes far
21 afield from what I also agree is the offense conduct
22 in the case, but I'm not convinced it doesn't touch
23 on the offense conduct.

24 So I think your objection goes to the
25 weight and not to the admissibility. I don't agree

1 with what I'm understanding the government's present
2 theory is, that this offense conduct extends as far
3 as what's described in this paperwork. But I think
4 there's some connection that comes in the paperwork
5 to the offense conduct.

6 So I overrule your objection. You can
7 take him on voir dire when it's your turn to cross.
8 Okay.

9 MR. DURDEN: Thank you.

10 MS. HEATH: If we can show Government's
11 Exhibit 2, if we can show the top half of the list
12 of names.

13 Q. (By Ms. Heath) Agent Singh, you were present
14 when Mr. McGraw was providing this information and
15 writing this information; is that correct?

16 A. Correct.

17 Q. And what does this list of words mean, from
18 what Mr. McGraw told you?

19 A. On the left would be the handles of ETA
20 members, in the center is what he believes are their
21 real names, and on the right are possible aliases
22 and locations.

23 Q. So for example, Nyk0N, the one you mentioned
24 N-Y-K zero N, is Kevin Gibbs?

25 A. Correct.

1 Q. C0aX is Ben Nichols?

2 A. Correct.

3 Q. And Cr4sh Overrld is James Smith; is that
4 correct?

5 A. Correct.

6 Q. And so on and so forth all the way down the
7 list; is that correct?

8 A. Correct.

9 Q. In fact, on this Government's Exhibit 2, which
10 I'll bring up in a moment, there's also a Splaxor;
11 is that correct?

12 A. That is correct.

13 Q. On the additional pages -- and I'm not going to
14 show them at this moment -- but Mr. McGraw also
15 provided his different accounts that he had, e-mail
16 accounts, YouTube accounts and things like that; is
17 that correct?

18 A. That is correct.

19 Q. And from some of those accounts -- you can take
20 Number 2 down.

21 From some of those accounts, you were able to
22 find videos and other presentations prepared by
23 Mr. McGraw; is that correct?

24 A. Correct, including one for Devils Night, where
25 he was recruiting members to -- in fact, other

1 machines added to the botnet for the attack.

2 Q. Now with regard to what Mr. McGraw was doing in
3 the Carrell Clinic, that building on Central
4 Expressway, you were one of the agents that actually
5 examined the computers or the data from the
6 computers from that building; is that correct?

7 A. That is correct.

8 Q. Okay. With regard to the offense that was
9 committed so he then could branch out and show how
10 the other individuals were also involved in the same
11 type conduct, what was he actually doing with the
12 computers at the Carrell Clinic?

13 A. I believe he was preparing to use them in his
14 denial of service, but also using them for personal
15 Web browsing.

16 We found e-mail on there from his Web mail
17 accounts. We found other malware on there. We
18 found remote access programs, LogMeIn, that was on
19 there, which allowed him to have access to those
20 systems.

21 And also in his interview, he advised that he
22 had shared user names and passwords with other
23 members of the ETA group to access those systems.

24 Q. Now, you indicated that he accessed these
25 computers. Most of the access was physical access,

1 is that correct?

2 A. Correct.

3 Q. So he's actually sitting down at the computer?

4 A. For the most part, correct.

5 Q. When he's sitting at the computer, how is he
6 able to get access to the computer? What was he
7 doing to the different computers?

8 A. The best I could tell is he was using a tool
9 called Ophcrack.

10 Q. And that's O-P-H --

11 A. It's O-P-H-C-R-A-C-K.

12 Q. -- crack?

13 A. Yeah, crack.

14 And at the time I had found evidence that he
15 had downloaded that on the HVAC system downstairs.
16 He was then taking that and then inserting it into
17 other computers.

18 Ophcrack allows you to recover passwords from
19 Windows-based systems. So essentially you put in
20 the disk, start the computer up, and it launches the
21 Ophcrack application before it even goes into the
22 normal Windows operating system.

23 THE COURT: Excuse me.

24 MR. DURDEN: Your Honor, I'm going to
25 object to this evidence as being repetitive under

1 Rule 403. This is all detailed at length in the
2 PSR. There's nothing further that's being added by
3 this witness that's not present in the PSR that's
4 before the Court.

5 THE COURT: I'm going to overrule the
6 objection. I understand where you are coming from.
7 I don't see that this is duplicative to the extent
8 where we've had too much of it. I'm going to allow
9 it.

10 MR. DURDEN: Your Honor, may I request --
11 it's getting late in the day -- that the government
12 try to focus their -- I withdraw my statement, Your
13 Honor.

14 THE COURT: All right. Go ahead,
15 Ms. Heath.

16 Q. (By Ms. Heath) So the Ophcrack was used to
17 basically crack the passwords on various computers
18 so he could access and get system administrator
19 rights to some of the computers; is that correct?

20 A. Correct, which allowed them to remove any
21 viruses and install the botnets.

22 Q. When you say botnets --

23 A. The bots.

24 Q. -- what type of botnets were there, and what is
25 a botnet?

1 A. The tool that Mr. McGraw was using was called
2 Rxbot. A botnet essentially is a group of computers
3 that are connected together via some program that
4 are not necessarily for malicious activity.
5 However, they can be used maliciously.

6 You will have either IRC-controlled bots or Web
7 http-controlled bots.

8 THE COURT REPORTER: Can you slow down a
9 little bit?

10 THE COURT: That's another problem. Slow
11 down and explain or spell out what you're saying.

12 A. Not a problem. A botnet consists of a
13 controller and victim bots. The controller normally
14 is either IRC, internet relay chat, or Web-based.
15 This particular bot was IRC based.

16 When you --

17 Q. When it's IRC based, does that mean once you
18 planted the bot on the computer, the malicious codes
19 and commands, once you placed those on the computer,
20 that computer now, when it's turned on or
21 operational, it will call into the -- or log into
22 the IRC chat and sit there, waiting for a command;
23 is that correct?

24 A. That is correct.

25 Q. And you found evidence on multiple computers at

1 the Carrell Clinic Building of this Rxbot having
2 been put on those computers?

3 A. Correct, on those nine computers.

4 Q. And have you also observed a video of
5 Mr. McGraw where he's accessing a computer and
6 showing bots, calling in or logging into this IRC
7 chat room?

8 A. Yes. I have one video which led us to the
9 Carrell Clinic in the first place. It showed
10 Mr. McGraw walking around the hospital, accessing a
11 computer, turning off antivirus, introducing the
12 botnet to the system. And then the next screen cuts
13 to him pulling up the IRC channel and then showing
14 how many bots were connected.

15 Q. And having control of bots means you have
16 control of the computer where the bot is planted.

17 A. Correct.

18 Q. And therefore, from this IRC channel,
19 Mr. McGraw could order all those computers then to
20 do what?

21 A. He could order them to collect documents, to
22 reach out simultaneously and connect to a website
23 like yahoo.com. And that's how you would get it to
24 initiate a denial-of-service attack.

25 Q. Now, have you seen a video of Mr. McGraw where

1 he's actually recruiting members to take over
2 computers in preparation of Devils Night?

3 A. Yes, I have.

4 Q. And where was that found, or where did you find
5 that video?

6 A. That was provided to me by the Texas Attorney
7 General's Office, and they told me they had gotten
8 it off of Mr. McGraw's YouTube channel.

9 MS. HEATH: Your Honor, the government
10 would offer into evidence that video just to show he
11 was recruiting members to do exactly what he did at
12 the Carrell Clinic, which was to take over computers
13 in anticipation of Devils Night. That's
14 Exhibit 102.

15 MR. DURDEN: Is this the Mission
16 Impossible video?

17 MS. HEATH: No.

18 MR. DURDEN: Okay.

19 Well, Your Honor, I object because it's
20 not relevant. It has nothing at all to do with the
21 objections before the Court. He has two offenses to
22 which he has pled guilty, for which the Court has to
23 sentence him.

24 And this has nothing to do with whether
25 he's a leader or an organizer. And as defined under

1 the guidelines, it's only offered for the purpose of
2 offering additional evidence, which is already
3 reflected in the PSR, and to incite and inflame the
4 finder of fact.

5 I object. This is again overly
6 cumulative. We have the PSR, we have the PSR
7 objections. I just feel like, you know, if I was
8 going to have a trial -- I mean -- excuse me.

9 THE COURT: I understand, Mr. Durden. But
10 they have objected. And you don't agree with their
11 objections, so they are entitled to try to prevail
12 on their objection.

13 I'm trying to make sure it's not
14 cumulative. But I think, for the most part, they're
15 entitled to offer this.

16 Again, it doesn't necessarily mean that
17 what they're offering I think is appropriately, in
18 its entirety, supportive of the point they're trying
19 to make.

20 But otherwise, I think there's enough I've
21 heard that it goes to the issue of leader or
22 organizer, and so I'm going to admit it.

23 Is that Government's Exhibit 2?

24 MS. HEATH: 102.

25 THE COURT: Government's Exhibit 102.

1 What was the other one?

2 MS. HEATH: Two.

3 THE COURT: Government's Exhibits 2 and
4 102 are in evidence.

5 MS. HEATH: I apologize for the number
6 discrepancy, but we kept the same numbers that we
7 had provided to the defense in preparation for
8 trial.

9 THE COURT: Go ahead.

10 MS. HEATH: Can we play Government's
11 Exhibit 102?

12 (Video played.)

13 Q. (By Ms. Heath) Agent Singh, was that one of
14 many videos regarding Devils Day?

15 A. Yes, it was.

16 Q. Are there videos where Mr. McGraw is
17 instructing members of the ETA how to go out and
18 compromise computers?

19 A. Yes. He's instructing them to go to places
20 like BestBuy, Internet kiosks, and install the bot
21 that way. Anything that's available publicly.

22 Q. So even before somebody purchases the computer,
23 he's wanting them to place this malicious bot on
24 there?

25 A. Correct.

1 Q. And does he indicate how they're supposed to be
2 putting the bots on the computers?

3 A. USB or I believe it was a flash memory card. I
4 can't remember if it was SSD or -- one of the flash
5 memory cards.

6 Q. So USB is a little thumb drive?

7 A. USB is a thumb drive, right.

8 Q. Now, you were involved in the search of
9 Mr. McGraw's house, as well?

10 A. No, I was not. That was happening while we
11 were interviewing him.

12 Q. From his house, were there books seized that
13 indicated that Mr. McGraw controlled or had examples
14 of defacements and intrusions?

15 A. Yes. Mr. McGraw had a binder with the names of
16 members of ETA and also exploits or screen shots of
17 what they have done.

18 Q. And the binder was divided up according to the
19 names of some of the individuals that were part of
20 the ETA, correct?

21 A. Correct.

22 Q. Including a big section for Mr. McGraw?

23 A. Correct.

24 Q. What name or handle did he go by?

25 A. Ghost Exodus and also Genesis.

1 MS. HEATH: Your Honor, may I approach the
2 witness?

3 THE COURT: You may.

4 Q. (By Ms. Heath) Let me show you Government's
5 Exhibit 216.1 and ask you if this book is the book
6 from Mr. McGraw's house with all the different
7 screen shots of defaced pages and intrusions.

8 A. It is.

9 MS. HEATH: Your Honor, the government
10 would offer Government's Exhibit 216.1 into
11 evidence.

12 THE COURT: Mr. Durden?

13 MR. DURDEN: Same objection previously
14 made.

15 THE COURT: Okay.

16 And Ms. Heath, can you narrow this down to
17 how this relates to this case?

18 MS. HEATH: Yes, Your Honor. Each one of
19 the pages in this book reflects an intrusion or
20 defacement of a particular Web page, a particular
21 system, similar to what Mr. McGraw was doing at the
22 Carrell Clinic.

23 This is evidence of him doing additional
24 intrusions to computers and, in some instances,
25 trying to gain control over those computers so they

1 could be used for Devils Day or Devils Night.

2 Also, he kept screen shots of what some of
3 the other ETA members were accomplishing in the same
4 manner, in defacing Web pages.

5 To deface each of these Web pages or to
6 intrude on these Web pages, he has to commit a 10-30
7 violation. He has to actually unlawfully access the
8 computer and transmit codes and commands to the
9 computer, just exactly the same conduct that he did
10 at the Carrell Clinic.

11 And the other individuals in the ETA had
12 to do the exact same thing at his direction. He was
13 the leader, he was directing them. He was keeping
14 evidence of their successful exploits into other
15 computers.

16 THE COURT: I'm going to sustain the
17 objection. I think this is too far afield, under
18 the circumstances.

19 I think the evidence as to what he planned
20 to do in connection with this case and the computer
21 systems in this case and to the extent it's
22 connected to what he was doing with others, that's
23 already been -- you've established that this was
24 going to be used to encourage this all-out attack on
25 the victim computers in this case.

1 Beyond that, I really think it is far
2 afield. And I really don't think it goes
3 sufficiently to the objections that you have made
4 and you are concerned with to admit it, so I sustain
5 the objection.

6 Q. (By Ms. Heath) Agent Singh, in addition to the
7 videos that you obtained during the investigation
8 after Mr. McGraw was arrested, there was a search
9 warrant done for Google or YouTube; is that correct?

10 A. Correct.

11 Q. And additional videos were obtained that
12 Mr. McGraw prepared which explained the Devils Night
13 and explained how the other individuals were
14 supposed to be assisting with this?

15 A. Correct.

16 Q. And I believe Government's Exhibit Number 60 is
17 the results from the Google search warrant, the
18 first Google search warrant that was done?

19 A. Yes.

20 MS. HEATH: And the government would offer
21 one video from Government's Exhibit 60.

22 THE COURT: And what's the purpose of
23 that?

24 MS. HEATH: Again, to show Mr. McGraw
25 directing other individuals to compromise computers

1 in anticipation of Devils Night.

2 THE COURT: And how, again, are they
3 connected to his direction, in your view, of
4 individuals in this case?

5 MS. HEATH: The only reason Mr. McGraw --
6 the only admitted reason Mr. McGraw compromised
7 computers at the Carrell Clinic was in furtherance
8 of this Devils Night.

9 THE COURT: I understand. I understand
10 that theory, and you've established that as far as
11 the government's theory.

12 But what does this add to that? Because
13 I'm not sure if this is more than you need.

14 MS. HEATH: The rival hacker gang, hacker
15 group, is a rival to the Electronik Tribulation Army
16 of which Mr. McGraw is the leader.

17 Mr. McGraw is instructing, as a leader
18 organizer, other individuals to do exactly what he's
19 done. He chose the Carrell Clinic Building in which
20 to compromise his computers.

21 He also compromised other computers, which
22 would be shown from the exploits in Government's
23 Exhibit 216.1. But also, he directed these other
24 individuals to be involved in compromising
25 computers.

1 THE COURT: Okay. And Mr. Durden?

2 MR. DURDEN: Your Honor, my objection is,
3 as I've stated before, the Court has allowed quite a
4 bit of latitude in going into something that's apart
5 from the actual offenses to which Mr. McGraw pled
6 guilty and is being sentenced for today.

7 Any further videos, testimony, exhibits
8 and evidence is merely cumulative and does not add
9 to the Court's --

10 THE COURT: I think this is cumulative.
11 And I think that to the extent it's not cumulative,
12 it's outside the offense conduct. I sustain the
13 objection.

14 Q. (By Ms. Heath) One of the additional victims
15 at the Carrell Clinic Building was the Cirrus Group;
16 is that correct?

17 A. That's correct.

18 Q. When Mr. McGraw was arrested and searches were
19 done, was a Dell computer seized from his possession
20 that actually belonged to the Cirrus Group?

21 A. Yes. It was a laptop.

22 Q. Did you talk to people at the Cirrus Group to
23 find out whether that was the only instance where
24 they had a problem with a computer?

25 A. No. They indicated that they had had several

1 laptops go missing.

2 Q. In fact, there was a second laptop, a different
3 laptop, that Mr. McGraw had taken and returned back
4 to the Cirrus Group; is that correct?

5 A. That's correct.

6 Q. That's the laptop he used in a video which
7 somebody had written in Magic Marker, ETA, on the
8 laptop; is that correct?

9 A. Correct. And in the video, Mr. McGraw was
10 using that one.

11 Q. In this particular video where Mr. McGraw is
12 using that laptop, sitting next to him is Splaxor,
13 another member of the ETA Group; is that correct?

14 A. Correct.

15 Q. And in that video, Splaxor is using an
16 identical Dell computer.

17 A. Correct.

18 Q. Did the Cirrus Group indicate they had multiple
19 computers disappear during the time Mr. McGraw
20 worked there?

21 A. Yes. I believe it was five.

22 Q. So one of the five was the one taken in his
23 possession that the FBI seized.

24 A. Correct.

25 Q. A second one was one that appeared in a video

1 that had "ETA" written on it; is that correct?

2 A. Correct. And that's the one that appeared back
3 in the Cirrus Group's inventory, but then they
4 quarantined it.

5 Q. When it appeared back in the Cirrus Group's
6 inventory, had it been reimaged or reformatted?

7 A. It had been reformatted.

8 Q. Had it been reimaged or reformatted to be a
9 duplicate of an image from another Cirrus computer
10 that was already present at the Cirrus office?

11 A. Yes, it was.

12 Q. Now, that particular computer, you were able to
13 find out what that computer had been doing while it
14 was gone because it had a program on it called
15 Computrace; is that correct?

16 A. Correct.

17 Q. Now, the remaining -- so that's two of the
18 computers. So the remaining three computers at the
19 Cirrus Group, other than the one that may appear in
20 the video where Splaxor is using it, you're not
21 aware of where those went?

22 A. Mr. McGraw said he had sold some online.

23 Q. When did he tell you that?

24 A. I think that was during a proffer session.

25 Q. Were these other computers recovered from the

1 Cirrus Group?

2 A. Not to my knowledge.

3 Q. Now, for the record, any of the Web page
4 defacements that were referenced in this 216.1, did
5 Mr. McGraw actually engage in some of those himself,
6 according to how the book is set up?

7 A. Yes.

8 Q. And when a Web page defacement occurs --

9 MR. DURDEN: Wait a minute.

10 Your Honor. I think I just caught
11 something. Is counsel referring to that book that
12 was offered as evidence, and then the objection was
13 sustained as to it?

14 THE COURT: Ms. Heath?

15 MS. HEATH: Yes, I think I mentioned the
16 number 216.1.

17 THE COURT: And what is the purpose of
18 this questioning?

19 MS. HEATH: I'm just focusing the agent on
20 those particular defacements so I can ask him
21 questions about whether a defacement is actually a
22 10-30 violation.

23 THE COURT: Okay. Which of your issues
24 does that go to?

25 MS. HEATH: That would again go to the

1 number of victims involved in the case, as well as
2 role in the offense, but primarily the number of
3 victims in the case.

4 THE COURT: But I don't know how we can
5 glean the number of victims from conduct which is
6 outside the offense conduct, which is the reason
7 that I sustained the objection.

8 I'm giving you some leeway to try to -- I
9 think you've covered all you need to cover on --
10 we've heard what you've had to say on laws, we've
11 heard what you have to say on role. Number of
12 victims, I'm willing to listen to that.

13 But right now I agree with Mr. Durden that
14 this doesn't do that, so I sustain the objection to
15 that question.

16 MR. DURDEN: Thank you, Your Honor.

17 MS. HEATH: Your Honor, I, just for the
18 record, would like to indicate that we do object to
19 that, in that the offense for which Mr. McGraw is
20 being convicted is a 10-30 violation.

21 The 10-30 violation, the intent of it was,
22 of course, to gather control of computers so he
23 could do a DDoS attack, which is a 10-30 violation
24 in the bigger scheme of things.

25 THE COURT: Don't you agree that these

1 enhancements that you are trying to get, objecting
2 that they weren't added, have to be based on offense
3 conduct? It's a relatively broad concept.

4 But offense conduct is set forth in the
5 presentence report. And I don't think that just
6 because a person is generally a hacker, that all of
7 their hacking activity can be considered in terms of
8 an enhancement.

9 Certainly to the extent it's connected
10 with a scheme in this case, and it doesn't have to
11 be precisely the indicted conduct, but it has to be
12 offense conduct. And I think Mr. Durden is correct
13 on this, that you're going beyond that.

14 You can't get victims from his general
15 hacking activity to add to this case.

16 MS. HEATH: And that's why we're not going
17 into the general hacking activity. We're trying to
18 go into what was focused on for the Devils Day
19 attack, the July 4th, which was within several days
20 of when he was arrested, and what his focus was for
21 the Carrell Clinic.

22 THE COURT: I think we just have a
23 difference of opinion on how far you can go on that.
24 So I sustain the objection. If you want to ask him
25 some more questions on the victim issue, I will let

1 you do that.

2 MS. HEATH: Your Honor, with regard to a
3 motion for an upward departure, this evidence, if
4 it's not properly considered to be part of the
5 offense conduct or part of what would be used to
6 calculate the guidelines in this case, we would
7 offer this evidence as part of the upward departure
8 to show that this defendant should be sentenced
9 higher, based on his conduct.

10 THE COURT: Well, I think there's a fine
11 line there. You'd have to show me some cases that
12 allow conduct that's not part of a criminal
13 conviction, criminal history, and that's outside the
14 scope of offense conduct. How generally being a bad
15 hacker is something I can rely upon to upwardly
16 depart. I don't know that I can, and I would
17 question whether or not I can.

18 It seems to me, when I'm looking even at
19 the 3553 factors, you look at the defendant,
20 generally his background and history, but it doesn't
21 extend to every bad thing he's ever done. It really
22 has to be something connected to the case or
23 something like a crime that goes to his criminal
24 history. I just don't think we can, any more than
25 you can in a trial, go to general 404(b) type of

1 evidence, which this is seeming to become to me.

2 It seems to me it has to be connected to
3 the number of victims or to properly admitted
4 evidence or considered evidence for upward
5 departure. So I think you're going far afield,
6 Ms. Heath, on that.

7 MS. HEATH: Your Honor, if I may have a
8 moment?

9 THE COURT: Yes, you may.

10 MS. HEATH: Your Honor, the only other
11 thing that I would mention with regard to the number
12 of victims in this case, during Mr. McGraw's
13 allocution to the Court, he did mention 50 or so
14 victims. So he has identified the fact that there
15 are additional entities that were victims of his
16 conduct.

17 And you know, we would offer this evidence
18 in to be consistent with what his own intent was,
19 which was to compromise as many computers as
20 possible, not limited by the building on Central
21 Expressway, so that he could engage in this Devils
22 Night attack.

23 THE COURT: All right, I understand that.
24 And I heard what he said, and I understand that's
25 what the government wants me to consider.

1 Is there anything else?

2 MS. HEATH: No, Your Honor. We pass the
3 witness.

4 THE COURT: Mr. Durden, do you want to
5 cross-examine?

6 MR. DURDEN: Yes, Your Honor. Thank you.

7 **CROSS-EXAMINATION**

8 **BY MR. DURDEN:**

9 Q. Good afternoon, Agent Singh.

10 A. How 'ya doin'?

11 Q. Did I pronounce that correctly?

12 A. Yes.

13 Q. Now, are you familiar with the indictment in
14 this case?

15 A. Yes.

16 Q. Okay. And it charges -- Count 1 dealt with
17 malicious code as to a computer, which is referred
18 to in the indictment as WBCCW125.

19 Did you have another name for that computer?

20 A. The Pink Flamingo.

21 Q. That was the Pink Flamingo? Okay. And then
22 there was the HVAC computer that was mentioned in
23 Count 2?

24 A. Correct.

25 Q. Now as to the offense conduct in the

1 indictment, transmitting the malicious code,
2 Mr. McGraw pled guilty to that. Okay?

3 Is there any other person who is criminally
4 responsible for that activity, for that offense?

5 A. For that indictment? No.

6 Q. Okay. Now, I wanted to mention this. All this
7 Devils Night and everything, Mr. McGraw told you
8 about that when you confronted him, didn't he?

9 A. Right.

10 Q. He could have said no, I don't want to talk to
11 you. I don't want to give you this information. I
12 mean he gave you a lot of information, didn't he?

13 A. Correct.

14 Q. Would you say he did the right thing?

15 A. Yes.

16 Q. Okay. And in doing that, he might have
17 actually maybe helped avert some harm that might have
18 been caused by this future activity that might have
19 been planned for later on, correct?

20 A. Correct.

21 Q. And in fact, I heard you refer to proffer
22 sessions, interviews. About how many times did you
23 meet with Mr. McGraw?

24 A. I would say three, but I would have to check
25 the official record on that. I think it was three

1 times.

2 Q. Did he speak with you each time?

3 A. He did, but only to his own actions. He
4 wouldn't provide any information on any other group
5 members.

6 Q. He told you what he did?

7 A. Yes.

8 Q. And was it helpful?

9 A. It confirmed what we thought, yeah.

10 Q. Okay. Did you fly in from Washington for the
11 hearing today?

12 A. Well, yes, I did. But also, my kids are on
13 spring break.

14 Q. So coming down here to visit again?

15 A. Yeah.

16 Q. Okay. Well, I'm actually from
17 Washington, D.C. --

18 THE COURT: Mr. Durden, you've been the
19 loudest complainer about wasting time. Let's move
20 ahead.

21 MR. DURDEN: I'll pass the witness, Your
22 Honor.

23 THE COURT: All right. Ms. Heath?

24 MS. HEATH: No further questions, Your
25 Honor.

1 THE COURT: You may step down, Agent.

2 Do you have another witness?

3 MS. HEATH: Your Honor, I will proffer
4 what Agent Lynd would say with regard to some of the
5 issues that you've indicated.

6 THE COURT: Okay.

7 MS. HEATH: Agent Lynd was involved in the
8 affidavit for the obstruction -- for the searches of
9 the sister's home and some of the other ETA members.

10 Agent Lynd would testify that he
11 interviewed a couple of those members of the ETA.
12 One particular member, Mr. Nichols, indicated -- who
13 went by C0aX and TheFixer -- Mr. Nichols indicated
14 that he assisted Mr. McGraw in that Rxbot, creating
15 the bot that was placed on all the Carrell
16 computers.

17 THE COURT: My recollection is that some
18 of this is in the presentence report about the
19 Nichols connection.

20 MS. HEATH: As far as the obstruction of
21 justice, I think it was, yes, Your Honor.

22 THE COURT: I was just thinking it was
23 part of the offense conduct. And maybe Ms. Foster
24 can help us out there. But I'm pretty sure there's
25 some mention of Nichols in there somewhere.

1 PROBATION OFFICER FOSTER: Yes, Your
2 Honor. I think it is part of the information about
3 obstruction.

4 THE COURT: Thank you. All right.

5 MS. HEATH: I'm offering it in a proffer
6 to show that the other members of the ETA were
7 involved in helping with the bot that was being used
8 for this Devils Night and the bot that was being
9 used for the Carrell Clinic intrusions, the bot that
10 was placed on most of the computers at the Carrell
11 Clinic.

12 THE COURT: Your theory being again, that
13 the whole Carrell Clinic event, which is the core of
14 this cause of action, this criminal case, again was
15 part of the tools or the prospective tools for this
16 Devils Night attack?

17 MS. HEATH: Correct, correct. And that
18 Mr. Nichols would admit that he was part of the ETA
19 group, as did Mr. Giles. And that they indicated
20 that they were aware and participating in the Devils
21 Night activities to attack other rival groups, and
22 so they were also involved in that.

23 THE COURT: Thank you. And I will accept
24 that proffer as part of the proof offered by the
25 government in this case.

1 Government rests on their points?

2 MS. HEATH: Government rests.

3 THE COURT: Mr. Durden?

4 MR. DURDEN: Thank you, Your Honor. May
5 it please the Court?

6 THE COURT: Mr. Durden.

7 MR. DURDEN: It's our position that the
8 PSR addendum correctly calculates the number of
9 victims who sustained an actual loss. That is set
10 forth at page 3 and 4 of the PSR addendum.

11 We've heard a lot of testimony about that.
12 But again, I think the testimony that we have heard
13 has been outside the scope of what is relevant
14 conduct, knowing that under 1B1.3, as the Court has
15 pointed out from the bench, relevant conduct is all
16 acts and omissions committed, aided, abetted,
17 counseled, commanded, procured by the defendant that
18 occurred during the commission of the offense of
19 conviction. And that's important.

20 And of course, if they were jointly
21 undertaking activity, we know the conspiracy law is
22 a little bit different.

23 But again, that occurred during the
24 commission of the offense of conviction. That
25 offense of conviction was in Counts 1 and 2 of the

1 indictment.

2 And when we look at the next point as to
3 the role, that the government has asked for 4 points
4 as leader organizer, well, leader organizer has to
5 be defined under 3B1.1, and you have to have an
6 organizer or leader that involved five or more
7 participants.

8 Well, participant is a word of art under
9 the guidelines. A participant is a person who is
10 criminally responsible -- and I'm looking at
11 Application Note 1 of guideline 3B1.1, a person who
12 is criminally responsible for the commission of the
13 offense.

14 And Agent Singh plainly said there's only
15 one person who's responsible for this offense, and
16 that's Mr. McGraw. Therefore, we don't have four
17 more participants, as that term is defined under the
18 guidelines. And that goes to the role enhancement
19 that's set forth on page 5, going over to 6, of the
20 PSR addendum.

21 Finally, as far as the actual loss
22 amounts, the witness on the stand testified that the
23 amount actually lost by the surgical center was --
24 well, the amounts actually, as used by the probation
25 officer in her calculations, I guess as I stand

1 here, you know, with all the testimony we've had and
2 all the witnesses and everything that's been
3 offered, it seems like we come back to the
4 sentencing hearing like we have in every case.

5 It comes down to what is in the PSR,
6 what's in the PSR addendum? We address those
7 issues. And then the Court, you know, moves forward
8 from that point.

9 It's our position that the PSR addendum is
10 correct as to all those issues objected to by the
11 government. The Court has already dealt with, of
12 course, the defendant's objections. And then we
13 would proceed to just ask the Court to proceed to
14 sentencing, based upon that. Thank you.

15 THE COURT: I think the government has
16 thoroughly covered their position. But I will give
17 you a chance to respond to that. And then we will
18 go from there with regard to the victims, the
19 offense conduct, any of that.

20 MS. HEATH: Your Honor, with regard to the
21 loss calculation, there's a difference between what
22 the actual loss would be, what the intended loss
23 would be, and what restitution is. They are totally
24 different types of calculations, and totally
25 different types of evidence can be introduced for

1 those.

2 With regard to the intended loss, I think
3 the government was trying to make it very clear what
4 the difference was between the actual loss and the
5 intended loss through the testimony of the witness
6 with regard to the surgical center.

7 She's only representing the surgical
8 center. She doesn't represent the Carrell Clinic
9 and she doesn't represent the Cirrus Group. So
10 those are the two other individual entities.

11 THE COURT: Ms. Heath, doesn't it sort of,
12 in this instance, boil down to reasonably
13 foreseeable?

14 MS. HEATH: Yes, Your Honor.

15 THE COURT: And that's really what I think
16 I have to look at. Were these losses, as you've
17 described, as catastrophic as they might have been?
18 Were they reasonably foreseeable?

19 So if you want to address that, we will
20 move on quickly to the other one that I'm most
21 interested in. And that's the leadership role.

22 MS. HEATH: The reasonable foreseeability
23 of Mr. McGraw's conduct is very apparent in his
24 admission in his factual resume; that the reason he
25 took over those computers and hacked into those

1 computers goes again back to doing a DDoS attack on
2 Devils Night.

3 On July 4th, he intended to take his army
4 of computers, including the army of computers that
5 his ETA members had gathered together, and use all
6 of the computers to attack rival groups.

7 During the time when the DDoS attack is
8 occurring, the victim computers that are being used
9 to implement the attack, they're focused on
10 implementing the attack. They're doing repetitive
11 actions towards a rival hacker group network.

12 While they're doing that, their systems
13 slow to the point of sometimes shutting down to the
14 point of potentially not being able to come back up
15 again.

16 So any service that was provided by those
17 computers -- and in this case, we have medical
18 computers that were used by the Carrell Clinic, and
19 we have the HVAC computer used in the surgery center
20 and for the building. Those computers would have
21 been shut down if Mr. McGraw had been permitted and
22 not stopped by the FBI, permitted to engage in his
23 Devils Night -- his DDoS attack.

24 So he, as an intelligent hacker who
25 employs sophisticated means with which to do all of

1 this, knows that when he causes a computer to
2 repeatedly attack another computer, the computer
3 that he's taking over, his bot computer, can very
4 well shut down. He's compromising hospital
5 computers with hospital information in the HVAC
6 computer.

7 We brought Ms. Shaw in because the HVAC
8 computer was the more system-controlling computer in
9 the building that actually would control the
10 environment in the middle of June in Texas. So had
11 that computer shut down during Mr. McGraw's July 4th
12 attack, yes, the HVAC computer would have slowed
13 down to the point of potentially stopping.

14 Another effect of trying to remediate what was
15 done by Mr. McGraw, you have to go in and almost
16 shut down everything to be able to then find what
17 was done and fix it, take it out, do what you need
18 to do. So everything has slowed down at this point.

19 But because of Mr. McGraw's conduct, he knew
20 that he was risking the integrity of those computers
21 to be able to operate efficiently. And when you're
22 affecting an HVAC computer, and as you read from the
23 presentence report, Mr. McGraw himself knew that he
24 could do a lot of bad things with the computer that
25 he had, that he could have shut down the air

1 conditioning system for whatever length of time it
2 took for the hospital to realize that that had
3 happened and then try to fix the systems.

4 So yes, we feel that that was reasonably
5 foreseeable to Mr. McGraw.

6 THE COURT: Let's talk about the
7 leadership issue. Respond to Mr. -- sorry, it's
8 late.

9 MR. DURDEN: Durden, Your Honor.

10 THE COURT: -- Durden's argument that it's
11 not connected -- this whole Devils Day attack that
12 he clearly has indicated he was going to use this
13 system in this case to participate in, that he says
14 that's not part of the offense conduct, not part of
15 what he pled guilty to. Just address that, if you
16 would.

17 MS. HEATH: There are videos that showed
18 on Government's Exhibit 60 that was not
19 introduced -- I'm sorry, 102, that showed that
20 Mr. McGraw was directing people that Devils Night
21 this year, 2009, would happen; that it was a dud
22 last year. He wasn't able to get it off the ground.
23 But this year, they were gathering enough computers
24 to do this.

25 Starting in about November, we know it's

1 November, because he's talking about President Obama
2 just having been elected, having President Obama as
3 the president. In some of these videos, he's
4 gathering his members of his Elektronik Tribulation
5 Army to go out and get as many computers as possible
6 to aim at Devil's Day.

7 THE COURT: Where do we get the five or
8 more people?

9 MS. HEATH: We have the list of
10 individuals.

11 THE COURT: Okay. I thought that's what
12 you were doing. I just wanted to make sure.

13 MS. HEATH: And from the videos he sends
14 out shout-outs: Thank you, Nyk0N; thank you,
15 Immortal; thank you whatever the individual's names
16 are.

17 On some of these videos he gives shout
18 outs to them for having done the compromises and
19 having done the defacings and having taken over
20 computers. So he thanks them on some of these
21 videos where he's actually involved in it.

22 With regard to even the HVAC computer, we
23 have Mr. Nichols admitting that he helped with the
24 Rxbot that went into the HVAC computer, as well as
25 other computers at the Carrell Clinic.

1 The individual that announced to law
2 enforcement that they had found on the Internet
3 postings of the HVAC system, it was posted by yet
4 another individual who was part of the ETA
5 organization.

6 Had we been allowed to get into some of
7 the videos, we could show that there were five or
8 more participants from the Electronik Tribulation
9 Army that were all participating in screen shots.

10 Government's Exhibit 216 in the book has
11 separate categories. Each of those individuals were
12 compromising computers in preparation for Devils
13 Day. So there are more than five people in this
14 book, five tabs in this book for the individuals
15 that were assisting Mr. McGraw.

16 THE COURT: Ms. Heath, I think you've
17 covered your positions on your issues. What I would
18 like to do is take a short break and come back and
19 let you each have two minutes to summarize, and then
20 we will go ahead and finish up.

21 (Recess taken from 5:28 to 5:35.)

22 THE COURT: Okay. I'm going to go ahead
23 and rule on the government's objections, and then I
24 will let you each talk a bit in summary.

25 This case had quite an amount of detail to

1 it. Both sides have worked very hard on this, and I
2 know the FBI has invested a lot of time and effort
3 in this.

4 Mr. Durden, as I have said before, this
5 was a tough case. You spent a lot of time on this.
6 You filed more than I usually get in criminal
7 sentencings. So I'm sure your client appreciates
8 that, and I appreciate that.

9 MR. DURDEN: Thank you, Your Honor.

10 THE COURT: With regard to the intended
11 loss, I understand the government's position on
12 this. And as I've said before, I think we had a
13 case not too long ago about the defacing of a
14 website and the intended loss there and how much
15 more difficult it is to prove.

16 I think the problem I'm having here is
17 what I mentioned with Ms. Heath earlier, that it
18 boils down to what is foreseeable, intended loss.
19 And I think the element that's missing for me here
20 with regard to bumping this amount up to any amount
21 other than what it is, especially up to 500,000, is
22 the foreseeability factor.

23 The reason I say that is because although
24 all of these catastrophic events could have
25 certainly occurred by virtue of what the defendant

1 was doing, given my understanding, and pretty much
2 undisputed, of his position in this company, he was
3 sort of a deep night security guard, worked there
4 for about six months, I don't think there's enough
5 information for me to rely on to find that he would
6 have even fathomed that these things could have
7 happened.

8 For example, I think in this similar case,
9 had you had, say, the nurse that was here
10 testifying, if she had been the hacker or someone
11 with her knowledge, it would be easy to say that
12 these losses would be foreseeable because she knew
13 exactly how the inner workings operated and the
14 fallout from something like this.

15 So I think the government has made a
16 valiant effort on this, but I don't think you've
17 established it under the pretty strict standard I
18 have to rely upon in finding what is reasonably
19 foreseeable. So I'm going to deny that objection.

20 With regard to the number of victims,
21 again I overrule that objection as well. I think
22 the only way I can get to the number of victims that
23 the government is asking for is to go outside the
24 offense conduct.

25 I think, for the record, that the defense

1 position on the offense conduct is narrower than the
2 law allows. I think offense conduct would include
3 what's in the presentence report, which offense
4 conduct itself hasn't been objected to in that
5 regard, as well as what's in the factual resume.

6 And for anyone reviewing this on appeal, I
7 know it's going to be confusing because of the
8 withdrawal of the original guilty plea and the
9 second arraignment coming without an actual document
10 filed in connection with that rearraignment.

11 But as I said at that time, we're relying
12 on -- and everyone agreed -- the factual resumes and
13 that information that are set forth in Document 21.

14 So reading Document 21, as well as the
15 offense conduct in the presentence report, I do
16 think the conduct itself goes farther, perhaps much
17 farther, than what the defense is trying to limit it
18 to. But I still don't think it goes far enough to
19 get the 50 victims.

20 To do that, I think we'd have to go
21 outside to general hacking activity. As bad as it
22 was, I don't think it sufficiently satisfies the
23 standard to constitute offense conduct. I overrule
24 that objection.

25 I sustain the objection as to the leader

1 role, however. I think that the offense conduct as
2 set forth in the presentence report, the offense
3 conduct as gleaned from the factual resume, as well
4 as the testimony from the agent more than
5 established beyond a doubt, in my regard, that this
6 scheme, that this whole compromising of the HVAC
7 system which is underlying the offense to which he
8 pled guilty, was part and parcel of this greater
9 scheme and an essential element of this greater
10 scheme, as I understand it, to institute this Devils
11 Day attack.

12 The Devils Day attack, from the
13 information from the agent, as well as the exhibits
14 I have admitted here at the sentencing hearing,
15 relying on the factual resume and all of the
16 information in the presentence report, the offense
17 conduct certainly established that there were five
18 or more participants that he was leading.

19 He himself -- I'm not going to rely on
20 everything he said, sort of blurted out during his
21 colloquy. But he specifically said he was a
22 leader/organizer. That was not solicited. It was
23 unsolicited.

24 I think the young man, Mr. McGraw, is a
25 very smart young man. And for all of those reasons,

1 I think the government has established that, which
2 results in a 4-level increase to the offense
3 conduct. And with a 4-level increase, we go to a
4 28, with an offense level -- with a criminal history
5 category of 1, which takes him to a 78 to 97 level.

6 Now, I know the government has asked for
7 upward departure, as well as a variance, as I
8 understand it, and the defense has asked for
9 downward in that regard. So I'll let you use your
10 closing minutes to make that argument, and then I
11 will make the sentencing.

12 Go ahead, Ms. Heath.

13 MS. HEATH: Yes, Your Honor.

14 Mr. McGraw has engaged in compromising
15 computers not only at the Carrell Clinic during his
16 security job there, but also at prior employers.

17 It's a continued pattern of activity where
18 he goes in, takes over a computer. At the Daystar
19 facility, when he went in within two or three days
20 of working there, he went into the computer,
21 unauthorized access. They have him on video. And
22 by his unauthorized access in transmitting codes and
23 commands to that computer, he took their whole
24 telephone system down.

25 So he is very aware that he can take down

1 systems. So his pattern of activity of prior
2 employers leading up to the Carrell Clinic shows
3 that he is constantly focused on hacking into
4 computers.

5 His letters from jail, his telephone calls
6 from jail indicate that he's going to continue this
7 activity. He had no intention of stopping this
8 activity. He wants to retaliate against people that
9 he believes have undermined his ability to continue
10 to hack into computers and be the leader of the
11 Electronik Tribulation Army.

12 Because of this pattern of conduct and
13 because of his desire to continue the activity, we
14 have a letter where he's telling them that he has
15 compromised the jail computers at Seagoville. He
16 has gotten into those systems and compromised those
17 computers.

18 So not even being in prison has stopped
19 his ability to continue his criminal activity as
20 focused on the 10-30 violation to which he pled
21 guilty.

22 For that reason, we request that the Court
23 consider upwardly departing in this case, because of
24 the totality of Mr. McGraw's conduct, for the safety
25 of the community and to assist him in being able to

1 change his behavior in the future.

2 We would also request some additional
3 conditions in jail. But I will wait until a
4 different point, if you want, to add or comment on
5 different conditions we would request in jail.

6 THE COURT: Thank you, Ms. Heath.

7 Mr. Durden.

8 MR. DURDEN: Thank you, Your Honor. May
9 it please the Court?

10 Yes, but did he? I mean that's what was
11 coming through my mind as I was listening to the
12 fine allocution of the government.

13 It was like the Devils Day could have done
14 this and Devils Day could have done that. But wait
15 a minute. He was, you know, arrested. He
16 voluntarily, you know, met with law enforcement,
17 gave them information which would have kept them
18 from -- you know, it would have allowed them to keep
19 this from happening. And then he's somehow asked to
20 be held responsible for that.

21 It seems to me so much like the argument
22 of, hey, this guy was selling -- some drug dealer
23 case. Hey, look. He was selling, you know, a gram
24 a week. And if we hadn't stopped him, over the next
25 three years, he would have sold this amount.

1 Yes, but he didn't, you know. You get him
2 for what he's done.

3 And this is also kind of troubling to me
4 when you look at the fact he's not getting
5 acceptance of responsibility, despite having met and
6 given all this evidence -- he even wrote out some of
7 these exhibits that they have offered. I mean he
8 handwrote that, and that's being used against him.

9 And he did that in an effort to try to do
10 the right thing. As challenging as it is for him,
11 he was trying to do the right thing and was trying
12 to help law enforcement minimize the damage of his
13 actions.

14 I would ask the Court to consider that
15 and, you know, consider the fact that he doesn't get
16 acceptance. In fact, he's getting obstruction and
17 he's ending up at such a high range.

18 Gosh, the hard thing about this case --
19 there's so many hard things. One of them is we've
20 got, you know, this two-and-a-half-year-old baby
21 crying for his mama. And he's pretty much left to
22 fend for his own and grow up in a way that society
23 hasn't really done a whole lot for him.

24 And now he has a little girl about that
25 same age, I guess, more or less, that's out there.

1 I just really hate to think of him being away from
2 that little girl for so long.

3 All in all, this comes back to an economic
4 crime. It's a 2B1.1 crime. The old law has always
5 been, as long as we've had any kind of organized
6 justice system, you pay for what you break; you
7 repay what you took. It's an economic crime.

8 But you know, there's no justice without
9 mercy, and there's a higher law. It says, blessed
10 are the merciful.

11 THE COURT: Thank you, Mr. Durden. If you
12 and your client could step over.

13 Mr. McGraw, you're a young man. And
14 you're a smart young man, smarter than most. I
15 don't know what your IQ is. But I would expect it's
16 impressive, given what you've been able to do
17 musically and otherwise.

18 As you know, we start off with this
19 guideline level with the points added. I said you
20 were up to 28, with an advisory guideline range of
21 78 to 97 months.

22 The thing I have to decide is whether or
23 not I should go above that, below that, or stay
24 within it and where. In deciding that, I have to
25 look at the factors of 18 U.S.C. Section 3553, and

1 they very, very much make a material difference for
2 me in this case.

3 Without specifically expressly stating
4 each factor, the first two, of course, are the
5 background of the defendant and the nature and
6 circumstances of the crime. We want to make sure
7 the offense promotes just punishment, is a
8 deterrent; promotes again respect for the law and
9 all the other factors.

10 But what I think causes me to find the
11 most reasonable sentence in this circumstance is a
12 couple of levels up from where it is right now. I
13 have a number of reasons for that.

14 Mr. McGraw, the nature of the crime here,
15 we have many, many young, brilliant people like
16 yourself out there with, for some reason, a complete
17 lack of responsibility or notion of how their
18 conduct impacts others.

19 And there is a very important principle at
20 stake here that others like that out there know that
21 this is very serious conduct that you don't get
22 probation for and you don't get a slap on the wrist
23 for, especially when it's consistent, chronic and
24 goes on over a period of time. And I'm talking
25 about just what's in the offense conduct here and

1 just what's in the factual resume.

2 It was a concerted effort, with nothing
3 that I can see behind it but ill will and an attempt
4 to harm. It wasn't necessarily anything I saw as
5 just fun or gaming. We have had cases like that
6 before, where people used computers to do something
7 called swatting each other; sometimes harmful,
8 sometimes not.

9 Here I didn't see anything but evil
10 purpose behind what you were doing over the course
11 and period of time that the offense conduct covers
12 in this case.

13 And although I'm very pleased to see how
14 you've acted today -- I see a different person than
15 I saw that first came in here on numerous occasions
16 who couldn't get along with his counsel and then
17 engaged in conduct that's outside the norm for
18 individuals arrested for this kind of crime, once
19 they've been in jail, and that is this obstruction
20 of justice conduct, which indicates to me that you
21 didn't quite get even close to the impact that you
22 caused with this crime or that you could have
23 caused.

24 The obstruction of justice, of course, you
25 got credit for that against you. But I'm going to

1 consider the way that obstruction of justice
2 occurred, including after you got in custody, that
3 indicates to me that you and your background, the
4 way you committed this crime and what you did after
5 you got arrested, warrants a strong message.

6 A reasonable sentence, in my view, that
7 promotes respect for the law and promotes
8 deterrence. Deters others like you from doing the
9 same thing, which if it was carried to its next
10 logical step, which you heard from the nurse, would
11 be devastating.

12 And certainly I'm not giving you credit
13 for the loss that could have occurred. But I'm
14 going to consider what could have happened if it had
15 been carried out as you planned, which would have
16 been devastating.

17 So I'm adding two levels. That takes you
18 to a level 30, with 97 to 121 months. You can't get
19 more than 121 months in this case. And I'm
20 sentencing you to 110 months on each count, to run
21 concurrently.

22 I think that's reasonable, under the
23 circumstances, and carries out the purposes of our
24 sentencing statutes, but not more than it should be.

25 Along with that sentence, if you'll bear

1 with me, is a term of supervised release. Let me
2 get my notes here.

3 A mandatory special assessment of \$100 on
4 each count; restitution in the amount of \$31,881.75,
5 payable to the Carrell Clinic, attention Thomas
6 Blair; \$26,468.75, United Surgical Partners
7 International, attention Robin Shaw; \$4,413; and
8 finally, the Cirrus Group, attention Jason Todd,
9 \$1,000.

10 The term of supervised release will be
11 three years. The conditions of supervised release
12 are as follows, and there will be no fine that I'm
13 going to order in this case. Two years supervised
14 release on each count, to run concurrently, with the
15 following conditions.

16 The defendant shall not commit another
17 federal, state or local crime.

18 The defendant shall not illegally possess
19 a controlled substance.

20 The defendant shall cooperate in the
21 collection of DNA, as directed by Probation.

22 The defendant shall not possess a firearm,
23 ammunition, destructive device or any other
24 dangerous weapon.

25 The defendant shall report in person to

1 U.S. Probation in the district to which he is
2 released within 72 hours of release from custody.

3 The mandatory drug testing condition is
4 suspended in this instance.

5 The defendant shall provide to Probation
6 any requested financial information.

7 The defendant shall pay any remaining
8 balance of restitution in the amount of the
9 \$31,881.75, as set out in the judgment.

10 The defendant shall participate in
11 workforce development programs and services
12 involving activities relating to occupational and
13 career development, including but not limited to
14 assessments and testing, educational instruction,
15 training classes, career guidance, counseling, case
16 management and job search and retention services as
17 directed by Probation.

18 Ten, the defendant shall participate and
19 comply with the requirements of the Computer and
20 Internet Monitoring Program, contributing to the
21 cost of the monitoring in an amount not to exceed
22 \$40 per month.

23 The defendant shall consent to the
24 probation officers conducting ongoing monitoring on
25 his or her computer. The monitoring may include the

1 installation of hardware or software systems that
2 allow the evaluation of computer use.

3 The defendant shall not remove, tamper
4 with, reverse engineer or circumvent the software
5 any way.

6 The defendant shall only use authorized
7 computer systems that are compatible with the
8 software and/or hardware used by the computer
9 Internet monitoring program.

10 The defendant shall permit Probation to
11 conduct a preliminary computer search prior to the
12 installation of software. The monitoring software
13 may be disabled or removed at the time during the
14 term of supervision at the discretion of Probation.

15 The defendant shall submit to periodic,
16 unannounced examinations of his or her computer,
17 storage media and/or other electronic or Internet
18 capable devices performed by Probation at a
19 reasonable time and in a reasonable matter, based
20 upon reasonable suspicion of contraband evidence of
21 a violation of supervision. This may include the
22 retrieval and copying of any prohibited data and/or
23 the removal of such systems for the purpose of
24 conducting a more thorough inspection.

25 The defendant shall provide written

1 authorization for release of information from his
2 Internet service provider.

3 The defendant shall not use any computer
4 other than the one he is authorized to use without
5 approval.

6 The defendant shall not use any software
7 program or device designed to hide, alter or delete
8 records or logs of his computer use, Internet
9 activities or files stored on his computer.

10 The defendant shall not use any computer
11 or computer-related equipment owned by his or her
12 employer, except for the strict benefit of his
13 employer in the performance of his or her
14 job-related duties.

15 The defendant shall provide the probation
16 officer with accurate information about his entire
17 computer system, and his e-mail shall only be
18 accessed through preapproved applications.

19 The defendant shall not install new
20 hardware, software, perform upgrades or effect
21 repairs on his or her computer system without
22 receiving prior permission from Probation.

23 He shall not use any ISP, Internet service
24 provider, account or any other online service using
25 someone else's account, name, designation or alias.

1 The defendant shall not view, possess or
2 compose any material that describes or promotes the
3 unauthorized access to computer systems and shall
4 not purchase, download, possess or install software
5 applications whose primary purpose is to scan and
6 detect vulnerabilities in computer networks or to
7 cause damage.

8 Ms. Heath, did you have something you
9 wanted to add or are requesting?

10 MS. HEATH: Yes. With regard to while
11 he's in custody and serving the sentence, we would
12 request that he not be permitted by the Bureau of
13 Prisons to use computers within the Bureau of
14 Prisons unless he can be properly monitored by
15 prison personnel.

16 THE COURT: All right. I was going to add
17 something with regard to restrictions in prison that
18 would restrict the defendant's access to any kind of
19 computer access while he is in prison. I'm not sure
20 exactly how to word that.

21 But Mr. Durden, I want to give a chance
22 for just your input on that.

23 MR. DURDEN: My input would be, Your
24 Honor, that truly the access that the defendants
25 have to computers under BOP supervision is very well

1 supervised and very restricted.

2 Just briefly, they pointed out that he
3 said something. But there really was no evidence
4 that he was able to do anything within the BOP
5 computers, and I don't think he can.

6 THE COURT: I would like to at least add a
7 condition that he be monitored in any type of
8 computer access by the Bureau of Prisons. I'm not
9 sure how I'm going to word that. But I think, given
10 the circumstances, that it's appropriate. I will
11 put it in there.

12 If you all have objections to it, we can
13 talk about it at another point in time. But I just
14 want to make sure that I put you on notice that I'm
15 going to put something like that in there.

16 MR. DURDEN: Certainly, he should comply
17 with all their rules and regulations.

18 THE COURT: Obviously, yes. And I
19 mentioned a \$100 special assessment on each count.

20 Are there any counts to dismiss? I think
21 we have -- do we not have a superseding indictment
22 in this case that was not the one pled to?

23 MS. HEATH: It's my understanding that his
24 guilty plea was to the original indictment.

25 THE COURT: Yes.

1 MS. HEATH: With regard to his guilty plea
2 and the sentence imposed, we will dismiss the
3 superseding indictment in this case.

4 THE COURT: Okay. Are there additional
5 counts in the original indictment?

6 MS. HEATH: No, there are not.

7 THE COURT: The superseding indictment
8 will be dismissed as motioned by the government,
9 with the order to be reflected in the minutes of
10 this case.

11 I'll talk to you in a minute about if you
12 have a request on location. Do you have a request?

13 MR. DURDEN: We do, Your Honor. First, we
14 would request FCI-Fort Worth. And then second, we
15 would request FCI-Seagoville.

16 THE COURT: I'll make those
17 recommendations.

18 MR. DURDEN: Thank you, Your Honor.

19 THE COURT: Mr. McGraw, you have a right
20 to appeal this sentence. You don't even have a plea
21 agreement. So you can appeal, within the reasoning
22 of you and your counsel, your sentence. Okay?

23 If you decide to appeal, you're entitled
24 to court-appointed counsel if you can't afford an
25 attorney. But you will have to have your notice of

1 appeal filed, even if it's handwritten, within ten
2 days of the date of the Court's judgment.

3 Just for safety purposes, I've kind of
4 adopted a standard operating procedure where I ask
5 counsel at sentencing to please be responsible for
6 finding out if he wants to appeal and getting the
7 notice filed.

8 If you need to withdraw for any reason,
9 I'll consider it right away after that.

10 MR. DURDEN: Thank you, Your Honor.

11 THE COURT: If there's nothing else --
12 nothing else?

13 MS. HEATH: No, Your Honor.

14 THE COURT: -- Mr. McGraw is remanded to
15 custody, and we will be in recess.

16 (Court in recess at 5:59 p.m.)
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C E R T I F I C A T E

I, Shawnie Archuleta, CCR/CRR, certify
that the foregoing is a transcript from the record
of the proceedings in the foregoing entitled matter.

I further certify that the transcript fees
format comply with those prescribed by the Court and
the Judicial Conference of the United States.

This 20th day of May 2011.

s/Shawnie Archuleta
Shawnie Archuleta CCR No. 7533
Official Court Reporter
The Northern District of Texas
Dallas Division

My CSR license expires: December 31, 2011

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